THE LAW

RELATING TO ACTIONS FOR

MALICIOUS PROSECUTION

HERBERT STEPHEN

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MALICIOUS PROSECUTIONS.

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THE LAW

RELATING TO ACTIONS FOR

MALICIOUS PROSECUTION.

BY

HERBERT STEPHEN, LL.M.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW,

Part Author of "A Digest of the Criminal Law: Procedure."

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PREFACE.

This book is intended to be, in the first place, a convenient collection of authorities upon the law of malicious prosecution; and, in the second place, a demonstration of the fact that the old doctrine, that the question of reasonable and probable cause is a question for the Court, has lost its vitality, and that the duty of determining that question has, by an ingenious but rather cumbersome process, been transferred from the Court to the jury.

I see no reason—at least no reason in the nature of the subject—why the Legislature should not recognize and indorse the change which, as I have explained in the text, I hold to have been finally consummated by the judgment of the House of Lords in *Abrath* v. *The North Eastern Railway Company*. I think that a convenient way of doing so would be to enact that in all future actions for malicious prosecution the plaintiff should be entitled to recover on proof that the defendant instituted the prosecution against him either without honestly believing him to be guilty, or without having a reasonable ground for believing him to be guilty; and that whether the defendant's ground for believing the plaintiff to be guilty was reasonable should be—as the judges have made it—a question of fact. In my opinion, this represents the substance of the existing law, and would relieve the judges of the fiction whereby at present they ask the jury whether the defendant took reasonable means to inform himself of the true facts of the case, and whether he honestly believed in the plaintiff's guilt, and on being told by the jury that he did

or did not, hold that he had or had not reasonable cause accordingly.

I see no reason why the necessity for proving malice should be retained. It is ineffectual, because the jury are at liberty to infer it from the want of reasonable cause, and it is now the jury and not the judge who decide whether or not a want of reasonable cause has been proved. It is almost impossible to imagine a jury finding that the defendant honestly believed his case, that he had not taken reasonable means to discover the truth, and that he had not been actuated by any "indirect motive."

It might also be convenient to settle by legislation the undecided question whether a corporation aggregate can be liable for malicious prosecution.

Chapter VII., which deals explicitly with the topic of the provinces of the Court and the jury as to reasonable cause, is equally applicable to the torts of malicious prosecution and false imprisonment, and Chapter VI. nearly so. The question what is reasonable cause for suspicion is identical in both torts, but in false imprisonment further questions arise of considerable intricacy, depending upon the rights and duties of constables, and of persons who are not constables, in the matter of arresting suspected persons.

Since the book has been in type the Standing Committee on Law of the House of Commons has introduced into the County Courts Consolidation Bill a clause giving to County Courts jurisdiction to entertain actions for malicious prosecution. Should this provision become part of the law, I hope that it may increase the number of those to whom this book may be useful.

H. S.

TEMPLE,
May, 1888.

P. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

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MALICIOUS PROSECUTIONS.

CHAPTER I.

THE WRIT OF CONSPIRACY.

Among the formal writs for the torts of different kinds which were recognised at the beginning of our legal history was one called the Writ of Conspiracy, which might be issued against two or more persons who had conspired together to prosecute a man criminally without lawful cause.

The form of this writ is given in Fitzherbert, and is as follows :—

[1] "The king to the sheriff, &c. If A. shall make you secure, &c., then put, &c. B. and C. that they be before us, &c. to show wherefore, having conspired together at N., they falsely and maliciously procured the aforesaid A. to be indicted of stealing, taking and leading away a certain beast at N., and him to be taken upon that occasion, and to be detained in our prison of Warwick, until in our Court, before our beloved and faithful R. and S., our justices assigned to deliver our gaol of Warwick, according to the law and custom of

[1] F. N. B. 114 D.

our realm, he was acquitted, to the great damage of him the said A., and contrary to the form of the ordinance in such case provided. And have there the names of the pledges and this writ. Witness, &c."

This was the form of writ in use where the prosecution complained of as malicious had been by way of indictment.

There was also another form for use where an appeal of felony had been brought against the plaintiff by the defendants, and had resulted in a nonsuit. In this case the defendants were called upon "to show wherefore, having before had conspiracy between them at N., they falsely and maliciously procured the aforesaid A. to be appealed of the death of D., lately slain at E., and him the said A. to be taken upon that occasion and to be detained in our prison of L. until in our Court before us the same A., &c., by the consideration of our Court departed quitted thereof, &c."

The statute referred to in these writs was the statute of Edward III., called "De Conspiratoribus," which begins with the following definition:—

[1] "Conspirators be they that do confeder or bind themselves by oath, covenant or other alliance that every of them shall aid and bear the other falsely and maliciously to indite or cause to indite, or falsely move or maintain pleas," and goes on to deal with the kindred wrong of maintenance.

[2] Since one person alone cannot be guilty of con-

[1] 33 Edw. 1, st. 2.

[2] 22 As. 77; *Cox* v. *Wirrall*, Cro. Jac. 193.

spiracy, this form of action lay only when more persons than one were concerned in the false indictment; and when the wrong was committed by only one person there was an action on the case "in the nature of an action of conspiracy" against him. The distinction between the two kinds of action is exhaustively treated in the judgment of Lord Chief Justice Holt in the case of *Savill* v. *Roberts*, 1 Ld. Raym. 374 (1678), which may be considered the foundation of the modern action for malicious prosecution.

"Where two cause a man to be indicted, if it be false and malicious, he shall have conspiracy; where one, he shall have case." He observed that, in strictness, conspiracy lay only for falsely indicting of treason or felony where life was in danger, and he pointed out that in conspiracy the jury could not convict less than two defendants; whereas in case, if there were more defendants than one, a verdict could be given against one only.[1]

Holt declared the conspiracy itself to be the "ground" of the action of conspiracy, while the ground of the action in case was damages, which might be damage to fame, as where the accusation was scandalous; damage to the person, "such as *imprisonamentum et arrestatio corporis*;" or damage to property, such as the necessary expenses incurred by the wrongfully prosecuted man in his defence.

Holt also gives the following account of how maliciously indicting came to be actionable at all. The

[1] The same thing was decided in *Price* v. *Crofts*, Sir T. Raym. 180.

common law, in order to hinder frivolous and vexatious suits, made every plaintiff find pledges, who was amerced if he failed to make out his claim. When this method became obsolete, successful defendants were enabled by statute to recover the costs to which they had been put; but for groundless criminal charges there had never been any remedy except by action.

Besides the essential differences between the two actions, others arose in consequence of the form of the writ. For example, in conspiracy, the writ said that the plaintiff had been acquitted, and therefore the action of conspiracy did not lie if the grand jury had ignored the bill. As to this, see *Smith* v. *Cranshaw*, Sir W. Jones, 93 (1625).[1] The action of conspiracy, therefore, fell into disuse, being superseded by the action on the case for malicious indictment or malicious prosecution, as the case might be, which was in use as long as formal actions lasted, and is now represented by the fact that malicious prosecution is a tort for which an action lies in the High Court. County Courts have no jurisdiction to entertain it (9 & 10 Vict. c. 95, s. 58).

[1] *Vide post*, p. 11.

CHAPTER II.

WHAT IS A PROSECUTION.

In order to be liable to an action for malicious prosecution a defendant must have prosecuted the plaintiff, and it therefore becomes necessary to determine what constitutes a prosecution.

The only definition which, so far as I know, has been explicitly suggested, is that given by Mr. Justice Lopes in *Danby* v. *Beardsley*, 43 L. T. 603 (1881) :—". . . this might be a definition of a prosecutor—a man actively instrumental in putting the criminal law in force." (This, however, requires to be qualified by the observation, that not merely the ministerial but the judicial functions of the criminal law must be put in motion, that is, some judicial officer must be made to act in his judicial capacity.[1]) It is not enough to say something which puts it into the head of somebody else to become so instrumental. In the case in which this suggestion was made it was proved that the plaintiff, who was the defendant's servant, lent a fellow-servant two pairs of horse-clipping machines, and took them away again when the other had done with them. The defendant had seen them lying about, and supposed they were his,

[1] *Vide post*, Chap. XIV., "The Distinction between Malicious Prosecution and False Imprisonment," p. 120.

and, missing them, he said to a policeman, "I have had stolen from me two pairs of clippers, and they were last seen in possession of Danby." The policeman, without further instructions, searched Danby's house, found the clippers, arrested Danby, and charged him with felony. The defendant was called as a witness, and gave evidence for the prosecution, both before the justices and at the trial which ensued. It was held that this did not amount to a prosecution by the defendant.

The counsel for the plaintiff having argued that the defendant "set the stone rolling," Mr. Justice Lindley replied that "the stone set rolling was a stone of suspicion only." A similar case, though not so strong, is *Harris* v. *Warre*, 4 C. P. D. 125; 48 L. J. Q. B. D. 310 (1879). In this case the point decided was, that it was not prosecuting to write a letter to a superintendent of police stating that the plaintiff had committed a murder, in consequence of which the police attempted, but in vain, to arrest the plaintiff.

It is a prosecution to swear an information, in consequence of which a warrant is issued for the plaintiff's arrest, if the information contains a statement that the informer believes the plaintiff to have committed an offence, but not otherwise.

In *Davis* v. *Noak*, 1 Star. N. P. C. 377 (1816), a declaration alleging that the defendant "charged" the plaintiff with felony, the evidence being that the defendant asserted in the information upon which the warrant was granted, that he "suspected and believed, and had good reason to suspect and believe," that the

plaintiff had committed larceny, was held to be good after a verdict for the plaintiff. The judgment is that of Lord Ellenborough, C.J., and Abbott and Holroyd, JJ., Bayley, J., *diss.*

But in *Cohen* v. *Morgan*, 6 D. & R. 8 (1825), where nothing more was proved than that the defendant went before a justice, and made a statement from which the justice's clerk drew the information, and that upon the plaintiff appearing, and being examined, the charge was dismissed, the plaintiff was nonsuited. In the case of *Leigh* v. *Webb*, 3 Esp. 164 (1800), the defendant, having, by means of a search-warrant, discovered some casks belonging to him in the house of someone else, swore an information stating this fact, but not making any direct charge against the plaintiff, or saying anything which amounted to a charge. The magistrate thereupon issued a warrant, and in an action for malicious prosecution, Lord Eldon nonsuited, saying that the defendant was not responsible if the magistrate erroneously thought that the facts sworn to amounted to a charge of felony. The case of *Wyatt* v. *White*, 5 H. & N. 371; and 29 L. J. Ex. 193 (1860), though nominally decided upon the question whether the defendant had reasonable and probable cause for laying the information, seems to me really to have been decided in the defendant's favour on the ground that nothing done by him amounted to a prosecution. Baron Channell said, in giving judgment: "This search-warrant does not direct an arrest on a charge of felony, but only to bring up the party found in possession of the goods to be charged if necessary." This case was decided in

1860; but in 1822 it had been decided, in the case of *Elsee* v. *Smith*, 1 D. & R. 28 (1822), that an action will lie for maliciously procuring a search-warrant to be issued, and the plaintiff's house to be searched. In this case the information stated that the informer suspected the goods to have been stolen, and the Court of King's Bench held that such an information, falsely and maliciously sworn, would support the action.

It appears that a charge orally made before a magistrate may be a sufficient prosecution to found an action upon, though there is no information, summons, or warrant. This was expressly laid down by Bosanquet, J., at *nisi prius*, in *Clarke* v. *Postan*, 6 C. & P. 423 (1834), where it was alleged that the defendant, after preferring a charge of assault, which the magistrate dismissed, said that he had also "a charge of felony for abstracting" certain goods, and the magistrate dismissed that charge also. However, the jury, after the direction that this might amount to a malicious prosecution, found that the second charge was not in fact made.. The same theory seems to have been established in a case of much higher authority, *Dawson* v. *Vansandeau*, 11 W. R. 516 (1863). In this case both parties were attorneys, and when the prosecution complained of occurred the defendant was prosecuting, and the plaintiff defending, a man named Poole on a charge of fraudulent bankruptcy before an alderman of the City of London. One of the plaintiff's witnesses admitted, in cross-examination, that he had, by the plaintiff's direction, signed a false statement prepared by the plaintiff, which the plaintiff had

produced in evidence at the examination. This admission having been made, the defendant there and then gave the plaintiff into custody, and on his being searched, a letter from Poole was found upon him, to some extent corroborating the witness's story. The defendant then charged him with conspiracy to defraud, and he was remanded by the alderman. The Court of Queen's Bench, in overruling the decision of Blackburn, J., at the trial, that there was no evidence of reasonable cause, held that the corroborative evidence was discovered "before the criminal charge was preferred against him with a view to prosecution," so that here the prosecution consisted in the formal, but apparently oral, charge made after the plaintiff was in custody.

If the defendant, being the prosecutor, has taken any active part in the prosecution at any stage subsequent to its institution, but for any reason is not liable for the institution of it (as when he was bound over to prosecute by mistake, or otherwise than by reason of his own malice), he is nevertheless liable for the prosecution. Thus, if a prosecutor under such circumstances gives evidence, instructs counsel, or otherwise carries on the prosecution, there is a sufficient prosecution by him for the purposes of the action. (*Fitzjohn* v. *Mackinder*, 9 C. B. N. S. 505; and 30 L. J. C. P. 257 (1861).)

Lord Denman, sitting at *nisi prius*, directed the jury, in *Clements* v. *Ohrly*, 2 C. & K. 686 (1847), that if the defendant had held himself out as maker of the charge against the plaintiff he was liable to the action. The evidence was, that the defendant accompanied a clerk of

Messrs. Fuller, who procured a warrant charging the plaintiff with forging the defendant's name to a bill, "with intent to defraud Richard Fuller and another," and that the defendant gave evidence on the hearing of the summons that he believed part of the bill to be in the plaintiff's handwriting, and that during the hearing the counsel for the prosecution "answered appeals" made to him by Mr. Edwin James "as counsel for Mr. Ohrly." There was also evidence that Messrs. Fuller directed the prosecution, took counsel's opinion, and instructed counsel, and told the defendant that he should be only a witness, and were defending the action against him in his name. Under these circumstances the jury found for the plaintiff, but it is of course possible they were influenced by the circumstance that Messrs. Fuller, who professed to have been the prosecutors, were also the substantial defendants.

Preferring a bill before the grand jury is a sufficient prosecution to support the action, whether the grand jurors find a true bill or not.

This is the natural consequence of the fact that the wrong which gave rise to the original actions of conspiracy, and of "case in the nature of conspiracy," was the conspiracy or malicious intention "to indict," which indicting consists in preferring a bill. [1] It was decided at the beginning of the 17th century, by the unani-

[1] This case was decided on a writ of error, the defendant's assignment of error being, "that this exhibiting a bill of indictment is no cause of action." The Court held that it was, and uttered the unguarded *obiter dictum* that, in that particular case, the defendant having justified and had a verdict against him, "it is good reason that the action should lie."

mous judgment of the Exchequer Chamber, in the case of *Payn* v. *Porter*, Cro. Jac. 490 (1619), that the grand jury having ignored the bill did not take away the right of action. A few years later the King's Bench held the same thing in *Smith* v. *Cranshaw*, Sir W. Jones, 93, and Palm. 315 (1625), which is one of the cases dealing with the distinction between the action of conspiracy proper, and the action on the case which is the modern action for malicious prosecution. The action was "for conspiring to accuse him *falso et malitiose*, and accusing him *falso et malitiose*." The judges "resolve que si un home ou plusors preferre un Bill de indictment de Felony *falso et malitiose* vers un auter home, & le Jury done *ignoramus* sur le Bill que en ceo case le partie poet aver Action sur le case." The judgment goes on to point out that conspiracy would not lie, because the formal writ in that case stated that the plaintiff had been "indicte & acquitte," and "le brief de conspiracy ayant un precise forme ne poet estre extende ultra le forme."

Where the bill was found by the grand jury, but the indictment was bad, so that theoretically the plaintiff could not have been convicted upon it, the action lies notwithstanding, if the prosecution was malicious and without reasonable cause.

This was first decided in *Taylor's Case*, Palm. 44 (1620), in which the successful counsel "argue fortement" that "neque est l'enditement le cause del action; mes les scandalous parols queux pojent lui traher in suspition de perjurie," of which crime the plaintiff had been accused. The same point was decided about a

hundred years later, along with many others, in the leading case of *Jones* v. *Gwynn*, 10 Mod. 148 & Gilb. K. B. 185 (1713), which was followed in *Chambers* v. *Robinson*, 2 Str. 691 (1732).

In *Jones* v. *Gwynn* the plaintiff sued the defendant for falsely and maliciously indicting him for exercising the calling of a badger without being licensed. The indictment was held to be bad—it does not appear why—and it was argued that therefore no action for malicious indictment lay. Parker, C. J., in delivering judgment, disposed of the point in the most conclusive manner. He pointed out that the cause of action was the trouble and expense to the plaintiff, which were equally incurred whether the indictment was good or bad. The amount of expense incurred was not material. If the badness of the indictment were an answer to the subsequent action, it would make it safe to indict maliciously as long as you made a slip in drawing the indictment. The action was one on the case for malicious indictment; but that the badness of the indictment is immaterial must *à fortiori* be true of an action for malicious prosecution.

On the other hand, a prosecution for one offence is not, it would seem, justified by the fact that there might have been reasonable cause for a prosecution for some other offence. In *Wicks* v. *Fentham*, 4 T. R. 427 (1791), the plaintiff proved that the defendant had indicted him for having permitted an escape as a constable, upon which indictment he had been acquitted, because he was not a constable but a headborough. Lord Kenyon thereupon nonsuited, on the ground that

the plaintiff had failed to show that there was no ground for the prosecution on the merits. The Court overruled the nonsuit, and ordered a new trial, holding, on the authority of the cases cited, that "a bad indictment served all the purposes of malice."

The action lies, whether the Court in which the prosecution took place was competent to take cognizance of it or not.

In *Attwood* v. *Monger*, Sty. 378 (1653), the action was for a false presentment before the Conservators of the Thames charging the plaintiff with having suffered eight loads of earth to fall into the Thames. After verdict for the plaintiff, the defendant moved, in arrest of judgment, that it did not appear on the record that the Conservators had authority to take the presentment, and that if they had not, the proceeding was one *coram non judice*, by which the plaintiff could not be prejudiced. Roll, C. J., said: "It is all one whether here were any jurisdiction or no, for the plaintiff is prejudiced by the vexation."

It seems that there is a malicious prosecution sufficient to support an action if the indictment contains substantially more charges than one, any one of which is malicious and without reasonable and probable cause.

In *Read* v. *Taylor*, 4 Taunt. 616 (1812), the defendant had indicted the plaintiff for perjury on twelve assignments, and the plaintiff had been acquitted. The defendant succeeded in showing reasonable and probable cause for three of the assignments, but not for the other nine. After a verdict for the plaintiff, the defendant moved for a rule *nisi* for a new trial. Mansfield, C. J.,

and Gibbs, J., refused a rule, saying that the whole indictment was set out in the declaration, and that it was enough for the plaintiff to show that any part of it was malicious and without reasonable and probable cause. Gibbs, J., said: "There is no probable cause for some of the charges in the indictment; therefore this indictment is preferred without probable cause."

Some doubt was thrown upon the authority of this case in the subsequent case of *Delisser* v. *Towne*, 1 Q. B. 333 (1841). Mr. (afterwards Chief Baron) Kelly stated in argument that the report of *Read* v. *Taylor* was probably incorrect; that the judgments as reported did not answer the points taken at the bar, and that the decision was inconsistent with the judgments of Lords Mansfield and Loughborough in *Johnstone* v. *Sutton*,[1] in which last objection Lord Denman concurred. *Delisser* v. *Towne* was also a case in which the plaintiff had been indicted for perjury on many assignments. One of the assignments was for swearing that he did not know whether or not he had paid a dividend under his bankruptcy. The rest were for statements about making a will, quite distinct from the statement about the dividend. The plaintiff proved that there was no reasonable and probable cause for the prosecution as far as concerned the one alleged perjury about the bankruptcy, and gave no evidence as to the other matters. He recovered 800*l.* damages, which sum was reduced by the advice of the Court to 500*l.* The matter subsequently came before the Court as an appeal

[1] 1 T. R. at pp. 507, 508, and 547, and *vide post*, p. 29.

from the Master's decision as to costs. It was held that the plaintiff was not entitled to the costs, which had been allowed by the Master, of the witnesses who would have proved the part of his case on which he gave no evidence. The Court, however, refused to give the defendant his costs as to the nine assignments which were not gone into; for they said that preferring the indictment, which was one charge, constituted one cause of action, and that "the plea of not guilty denies that one cause of action, and amounts to an assertion that the defendant had probable cause for the whole of the indictment. That is an entire issue; and, if there was no probable cause for any part of the charge,[1] the plaintiff was entitled to a verdict." In *Boaler* v. *Holder*, 51 J. P. 277; 3 Times Law Rep. 546 (1887), the plaintiff was indicted under 6 & 7 Vict. c. 96, s. 4, for publishing a libel knowing it to be false, and was found not guilty of publishing a libel knowing it to be false, but guilty of publishing a libel, and was imprisoned. He sued for malicious prosecution, and the judge, on proof of the conviction, dismissed his action, and gave judgment for the defendant. The Divisional Court (Wills and Day, JJ.) made an order absolute for a new trial, on the ground that the conviction was bad, and amounted in law to an acquittal. Wills, J., added, "To put a man on his trial for a much graver offence than you have any chance of convicting him of, is a legal wrong. The plaintiff has made out that he had

[1] This obviously means "if there was any part of the charge for which there was no probable cause."

been put on his trial wantonly, and that there was an absence of reasonable and probable cause."

A prosecutor is not the less responsible for the prosecution because he was bound over to prosecute by the committing justices, if such binding over is the result of malicious conduct on his part, whether the prosecution by him is prior or subsequent to the binding over. *Dubois* v. *Keats*, 11 Ad. & E. 329 (1840); *Fitzjohn* v. *Mackinder*, 9 C. B. N. S. 505; and 30 L. J. C. P. 257 (1861).

The principal case on this subject is *Fitzjohn* v. *Mackinder*. Mr. Justice Williams, who tried the case, nonsuited the plaintiff, but though he had made up his mind to do so, let the case go to the jury, presumably that the verdict might save a new trial in the event of his nonsuit being subsequently overruled. The Court of Common Pleas, Willes, J., dissenting, affirmed the nonsuit, and the plaintiff appealed to the Court of Exchequer Chamber. In that Court the judges, for the purpose of determining whether the case was a proper one to be left to the jury, assumed the findings of the jury to be correct, and they were as follows:—The defendant sued the plaintiff in a county court, and the plaintiff relied on a set-off, in answer to which the defendant produced a settlement of accounts, purporting to be signed by the plaintiff, and swore falsely that the plaintiff had signed it. The plaintiff swore he had not signed it; but the judge, not believing the plaintiff, of his own accord made an order under 14 & 15 Vict. c. 100, that he should be tried for perjury, and bound

the defendant over to prosecute. The defendant prosecuted accordingly, and gave false evidence before the grand and petit juries, of which the former found a true bill, and the latter acquitted the plaintiff. In the Exchequer Chamber, Blackburn and Wightman, JJ., thought that the nonsuit was right, principally on the ground that the prosecution was a prosecution not by the defendant, but by the county court judge. Cockburn, C. J., Bramwell and Channell, BB.,[1] on the other hand, thought the nonsuit wrong, on the ground that the defendant was not bound by his recognizances to give false evidence, or indeed to continue the prosecution after preferring the bill before the grand jury. Baron Bramwell thought that the binding over was a good answer as far as preferring the indictment went, and that no action would have lain if the grand jury had ignored the bill; but the Lord Chief Justice and Baron Channell dissented from this view, because the defendant might, if he had liked, have forfeited his recognizances. If Baron Bramwell's view of the case was the right one, the fact that the evidence given by the defendant in prosecuting the plaintiff was false was essential to the decision of the question. In the other view it was material whether the substantially identical evidence which he gave before the county court judge was false. Yet, as one reads the case now, there seems to be no particular reason, except the verdict, for supposing that it was false.

[1] The report in C. B. N. S. says that seven judges heard the case argued. I do not know why the other two gave no judgment.

In *Eagar* v. *Dyott*, 5 C. & P. 5 (1831), Harman, who was a co-defendant with Dyott, had been bound over to prosecute and give evidence by mistake, without his own consent, and did not employ the attorney for the prosecution, upon proof of which Lord Tenterden "directed an acquittal."

Dubois v. *Keats*, 11 Ad. & E. 329 (1840), was chiefly relied upon for the plaintiff in *Fitzjohn* v. *Mackinder*. In that case Coleridge, J., had told the jury that if the defendant being bound over to prosecute was the result of a charge made maliciously before the magistrate, such binding over was no defence to the action. The Court of Queen's Bench refused a rule for a new trial asked for on the ground that this was a misdirection; and, inasmuch as it only amounted to saying that a malicious prosecution is actionable before the stage of committing for trial or binding over to prosecute is reached, there can be no doubt that they were right, although the bearing of the decision upon the question raised in *Fitzjohn* v. *Mackinder* is not so clear.

It seems that an action will lie for a malicious prosecution in an Ecclesiastical Court. *Fisher* v. *Bristow*, 1 Dougl. 215 (1779), was an action for maliciously presenting the plaintiff for incest in the Ecclesiastical Court of the Archdeaconry of Huntingdon. A demurrer to the declaration on another ground[1] was successful, but no objection was raised as to the nature of the prosecution.

[1] *Vide post*, p. 99.

CHAPTER III.

WRONGS RESEMBLING MALICIOUS PROSECUTION.

It has been held, or suggested, that actions may lie for various torts more or less closely analogous to malicious prosecution. The chief of these are:—

Malicious arrest [this is nearly obsolete]:
Bringing or conspiring to bring a civil action vexatiously:
Maliciously taking proceedings in bankruptcy:
Maliciously presenting a petition for the winding-up of a company:
Maliciously obtaining a search warrant for goods:
Maliciously obtaining a search warrant under the Criminal Law Amendment Act, 1885:
Maliciously exhibiting Articles of the Peace.

Malicious arrest.—Owing to the abolition of arrest on mesne process, this subject has lost its importance. But there never was any doubt that maliciously and without reasonable and probable cause to procure the arrest of anyone was actionable. *Scheibel* v. *Fairbairn*, 1 B. & P. 388 (1799); *Gibson* v. *Chaters*, 2 B. & P. 129 (1800); *Page* v. *Wiple*, 3 East, 314 (1803); *Jennings* v. *Florence*, 2 C. B. N. S. 467 (1857); *Gilding* v. *Eyre*, 10 C. B. N. S. 592 (1862). If the arrest was for a larger sum than was due it might be malicious as to the excess, though justifiable as to the debt. Where the defendant had obtained judgment against the plaintiff for 115*l.* 2*s.*,

and also, in a separate action for the same debt, against C. for 100*l.* 10*s.*, and the judgment debt of 100*l.* 10*s.* had been satisfied by C., and the defendant arrested the plaintiff on a *ca. sa.* for the whole sum of 115*l.* 2*s.*, and imprisoned him for four weeks till he obtained a judge's order for his release, the declaration was held good on demurrer by Lord Campbell, though it would not have been good if malice and want of reasonable and probable cause had not been averred. *Churchill* v. *Siggers*, 3 E. & B. 929 (1854).

It would seem, on the analogy of these cases, that an action would lie for maliciously and unreasonably causing the plaintiff to be detained under a writ of *ne exeat regno*. See *Bank of British North America* v. *Strong*, 1 App. Cas. 307 (1876).

Bringing or conspiring to bring a civil action maliciously.—It is doubtful whether an action lies for suing or—apart from the law of maintenance—for conspiring to sue the plaintiff vexatiously at Nisi Prius. In *Cotterell* v. *Jones*, 11 C. B. 713 (1851), a declaration to this effect was held bad on demurrer, because it did not show legal damage. Williams, J., said, in the course of his judgment: "For improperly putting the law in motion in the name of a third person, . . . if there be malice and want of reasonable and probable cause, no doubt the action will lie, provided there be also a legal damage." The other judges expressed no opinion on the point.

A somewhat similar case is mentioned in the Year

Book (3 As. 13, 1275): "Un bill de Conspiracie fuit maintenu en Bank le Roy ꝑ agard pur celuy q̃ fuit endire [? endite] de cōmon trespas, and acquit, non obstant que ceo ne fuit mie felonie." But in this case the proceeding is described as an indictment; and there is no doubt that trespass was at that date in some degree of a criminal character.[1]

Fitzherbert also states (F. N. B. 116) that "the action [of conspiracy] lies for bringing groundless actions at Nisi Prius."

In *Attwood* v. *Monger*, Style, 378 (1653), Roll, C. J., said: "I hold that an action upon the case will lye for maliciously bringing an action against one where he had no cause; and if such actions were used to be brought it would deter men from such malicious courses as are often put in practice." It is, however, not clear that he was speaking of civil actions.

There are two precedents for actions for maliciously and unreasonably suing *in rem* and arresting ships. *Castrique* v. *Behrens*, 3 E. & E. 720 (1861), was an action for maliciously, and without reasonable and probable cause, suing the plaintiff in France in an action *in rem*, and causing his ship to be condemned there. It was argued on demurrer in the Court of Queen's Bench, and decided in the defendant's favour, on the ground that the declaration did not allege the proceeding to have terminated favourably to the plaintiff.[2] In *Redway* v. *McAndrew*, L. R. 9 Q. B. 74 (1873),

[1] See note by Mr. F. W. Maitland in Pollock's Law of Torts.

[2] *Vide post*, p. 100.

a declaration for maliciously and without reasonable and probable cause procuring the plaintiff's ship to be arrested and detained in England was held good on demurrer (by Blackburn and Archibald, JJ.; Quain, J., *diss.*); but, as in *Castrique* v. *Behrens*, the only point relied upon by the defendant was, that the declaration did not sufficiently show a termination of the proceedings favourable to the plaintiff. The question, whether or not the action lay, does not seem to have been raised in argument, and was not decided in the judgment in either of these cases.

The view that no action lies at present for bringing, or conspiring to bring, a civil action—at any rate *in personam*—maliciously and without reasonable cause, is strongly supported by the observations of Bowen, L. J., in *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674, at p. 690; and 52 L. J. Q. B. D. 488 (1883).

Maliciously taking proceedings in bankruptcy.—Actions have several times been maintained for maliciously and without reasonable and probable cause instituting proceedings in bankruptcy.

The question appears to have been first raised in 1763, when it was argued, in *Brown* v. *Chapman*, 1 W. Bl. 427, that an action did not lie for maliciously suing out a commission of bankruptcy, because the bankruptcy statutes (5 Ann. c. 22, s. 7; 5 Geo. I. c. 24; 5 Geo. II. c. 30, s. 23) provided specific remedies. But Lord Mansfield said: "This case is too clear to hear any argument on the other side. There is no clause to

take away the jurisdiction of the common law—no clause that a man shall not receive more damage than 200*l.*," which was the limit of the statutory penalties. From which it appears that the existence of such actions must have been established before the statutes were passed.

And as in the case of an indictment, so with a petition for adjudication, that where it is malicious and actionable, it is not the less so because it is bad. In *Farly* v. *Danks*, 4 E. & B. 493 (1855), which was an action for maliciously, &c., causing the plaintiff to be adjudicated a bankrupt, it was argued that the petition, which was the act complained of, though it was mostly false and decidedly malicious, was not sufficient in form to justify the adjudication. Lord Campbell and the rest of the Queen's Bench unanimously held that "cause" in this connection did not mean legally and regularly cause, but had its natural and wider meaning.

Two cases (*Cotton* v. *James*, 1 B. & Ad. 128; *Whitworth* v. *Hall*, 2 B. & Ad. 695) were decided on other points in 1830 and 1831 respectively, in which the plaintiffs sued for the same wrong without any question being raised as to whether or not the action lay.

In *Johnson* v. *Emerson*, L. R. 6 Ex. 329 (1871), Martin, B. (at pp. 377—80), expressed a doubt whether an action lay for presenting a petition for adjudication under the Bankruptcy Act of 1869. In that case the question was whether there was evidence for the jury of malice or want of reasonable and probable cause. The Court was divided, Kelly, C. B., and Cleasby, B., holding that there was, and Martin and Bramwell, BB.,

that there was not; but no doubt whether such an action lay was expressed by anyone except Baron Martin.

In *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674; and 52 L. J. Q. B. D. 488 (1883), however, the Master of the Rolls expressed his opinion that the doubts of Baron Martin in *Johnson* v. *Emerson* were unfounded, and that, under the Act of 1869, such an action lay. On the whole, it appears that maliciously and without reasonable cause endeavouring to make a solvent man a bankrupt is actionable by precedent, but it does not seem to be clearly ascertained what proceedings are necessary to constitute the wrong, nor do I know of any such case having been tried since the passing of the Bankruptcy Act, 1883.

Maliciously presenting a petition to wind up a company. — An action lies for maliciously and without reasonable cause presenting a petition to wind up a company. It is not necessary to prove special damage. *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674; and 52 L. J. Q. B. 488 (1883). The ground of the action is the injury to the company's credit, and the action was said by the Master of the Rolls to be closely akin to that for maliciously and without reasonable cause taking proceedings in bankruptcy.

Maliciously procuring the issue of a search warrant for goods.—This, as already stated,[1] has been repeatedly held to be actionable, and to be subject to substantially

[1] *Vide ante*, p. 8.

the same conditions as the ordinary action for malicious prosecution. *Leigh* v. *Webb*, 3 Esp. 164 (1800); *Elsee* v. *Smith*, 1 D. & R. 28 (1822); *Wyatt* v. *White*, 5 H. & N. 371; and 29 L. J. Ex. 193 (1860).

Maliciously obtaining a search warrant under 48 & 49 Vict. c. 69.—In 1886 an action was brought for maliciously and without reasonable cause laying an information before a justice and procuring him to issue a warrant under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69, s. 10), to search the plaintiff's house for the daughter of the defendant, who suspected that she was detained there for immoral purposes. The action was tried before Mr. Justice Manisty, who held that there was no reasonable cause for obtaining the warrant, and left the question of malice to the jury, who found for the plaintiff. The Divisional Court (Lord Coleridge, C. J., and Mathew, J.) held that there was no evidence of want of reasonable cause, and entered judgment for the defendant. Lord Coleridge expressed the opinion that if the magistrate who granted the warrant satisfied himself, as the Act requires him to do, that there was reasonable cause for suspecting that the girl was detained as alleged, that was a complete answer to such an action. It does not seem to have been argued that the action did not lie. *Hope* v. *Evered*, 17 Q. B. D. 338; and 55 L. J. M. C. 146 (1886).

Maliciously exhibiting articles of the peace. An
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action lies for this wrong, or for maliciously procuring a justice of the peace to bind the plaintiff over to keep the peace. *Steward* v. *Gromett*, 7 C. B. N. S. 191 (1859). A person against whom articles of the peace are exhibited, or an application to bind him over made before a justice, cannot be heard to contradict the statements in the articles, but must be bound over if they show sufficient cause on the face of them. *R.* v. *Doherty*, 13 East, 171 (1810).

Actions have been brought for maliciously and without probable cause proceeding to outlawry, which was afterwards reversed, in respect of an unfounded claim of debt (*Drummond* v. *Pigou*, 2 B. N. C. 114 (1835)); and for maliciously issuing a commission of lunacy (*Turner* v. *Turner*, Gow, 20 (1818)). In each of these cases the judge nonsuited, on the ground that the evidence showed probable cause for the proceeding; and in the former the Court of Common Pleas upheld the nonsuit, and discharged a rule for a new trial.

Prosecution, for what.—It may be laid down as a general rule, deducible from the authorities, that wherever there is a prosecution for a criminal offence an action for malicious prosecution will lie if the prosecution was malicious and without reasonable cause, whatever the alleged criminal offence may have been.

There seems at one time to have been a distinction between prosecutions for crime of a disgraceful character and prosecutions substantially amounting only to actions for penalties.

Low v. *Beardmore*, Sir T. Raym. 135, 17 Car. 2, was an action on the case for maliciously indicting the plaintiff for a rescue. It does not appear that judgment was given; but Twisden, J., is reported to have said, "In *Chamberlain & Prescot's case* it was resolved in this Court that the action lies for such indictment, but the judgment was afterwards reversed in the Exchequer Chamber; but it seemed a hard case if the action should not lie."[1] *Henley* v. *Burstall*, Sir T. Raym. 180, 21 Car. 2, was an action on the case for indicting the plaintiff for misbehaviour as a justice of the peace. It was held that the action lay, because the prosecution was for "matter of imputation and slander as well as crime." A prosecution for forcible entry was suggested as an instance of a charge of "crime without slander," for which an action for maliciously indicting would not lie. An *obiter dictum* in this case, that an action would not lie for falsely indicting of trespass, was overruled by Holt, C. J., in *Savill* v. *Roberts*, 1 Ld. Raym. 374; and 1 Salk. 13 (1678).

On the other hand, criminal prosecutions for nuisance and the like have always been recognized as sufficient to sustain actions for malicious prosecution. In the 17th century it was held that an action lay for a malicious presentment before the Conservators of the Thames, whether the Conservators had jurisdiction to take the presentment or not. *Attwood* v. *Monger*, Style, 378 (1653).

[1] The decision in *Chamberlain* v. *Prescot* is, I think, inconsistent with that in *Jones* v. *Gwynn*.

CHAPTER IV.

MALICE AND WANT OF REASONABLE CAUSE MUST CONCUR.

It is the principal rule of actions for malicious prosecution that the plaintiff, in order to succeed, must prove both that the defendant's conduct in prosecuting him was malicious, and also that he had no reasonable cause for the prosecution.[1] This was clearly established in the *Anonymous case*, 6 Mod. 73 (1704), which is occasionally also cited as *Warren* v. *Matthews*. There the Court held, "That let a prosecution be never so maliciously carried on, yet if there be *probable* cause or ground for it no action for malicious prosecution will lie." This has been held to be law ever since, the authority perhaps most often cited being that of Lord Mansfield and the Court of King's Bench in *Farmer* v. *Darling*,[2] 4 Burr. 1971 (1766).

The rule that whether there was malice is a question of fact, and whether there was reasonable cause a question of law, or, at any rate, a question for the judge, is discussed later, in Chapter VII. Juries have often been

[1] The plaintiff must give sufficient evidence to establish a *primâ facie* negative proof that the defendant had not reasonable cause for prosecuting (*Abrath* v. *N. E. R. Co.* *Vide post*, p. 107).

[2] In this case counsel said that the amount of damages was not excessive as against the defendant, because he was Sheriff of London, and might have been excused if he had been worth less than 15,000*l.*

told that they are at liberty to infer malice from a judicial direction that there was a want of reasonable cause. This, for reasons that will presently appear, is a direction which juries are less likely to get in future. It was emphatically laid down by Lords Mansfield and Loughborough, in *Sutton* v. *Johnstone*, 1 T. R. 493, and in error, 510 (1786), that want of reasonable cause cannot be inferred from malice.

The case was an extremely important one on many grounds; and this seems a suitable place to give some account of it. Sutton, the plaintiff, was a captain in the navy, and was in command of the *Isis*, which was one of the ships forming a squadron under the command of Johnstone, the defendant. The *Isis* having been much damaged in action, it was physically impossible for Sutton to obey an order given by Johnstone that the ships should advance in line. Accordingly he did not obey it, though, in the words of the declaration, he "did not wilfully and willingly disobey" it. Johnstone thereupon placed him under arrest, and kept him under arrest for three years, at the end of which time he was tried by court-martial for disobedience to orders whereby the public service was hindered and an opportunity of escape was afforded to the enemy, and acquitted, on the ground that he had done all that was possible under the circumstances. The jury found a verdict for 6,000*l.*, which appears from the report to have been a very fair decision on the merits, and the Court of Exchequer refused a rule for a new trial, on the grounds that the long period between arrest and trial was evidence of

malice (which it certainly was), and that the condition of Captain Sutton's ship, which was not in dispute, and must have been known to the defendant, was evidence of want of reasonable cause. The case was argued in error before Lords Mansfield and Loughborough, the principal assignment of error being that it appeared from the declaration that there was reasonable cause for the prosecution. They reversed the judgment of the Court of Exchequer, in a judgment of which the following are the most material parts:—

[1]"There is no similitude or analogy between an action of trespass or false imprisonment and this kind of action. An action for trespass is for the defendant's having done that which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution which, upon the face of it, is manifestly legal.

"The essential ground of this action is, that a legal prosecution was carried on *without a probable cause.* We say this is emphatically the essential ground, because every other allegation may be implied from this; but this must be substantially and expressly proved, and cannot be implied.

"From the want of probable cause, malice may be, and most commonly is, implied. The knowledge of the defendant is also implied.

"From the most express malice the want of probable cause cannot be implied.

"A man, from a malicious motive, may take up a

[1] At p. 544.

prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt; and in neither case is he liable to this kind of action.[1]

"After a verdict, the presumption is that such parts of the declaration, without proof of which the plaintiff ought not to have had a verdict, were proved to the satisfaction of the jury. In this case, to support the verdict, there was nothing necessary to be proved, but that there was no probable cause from which the jury might imply malice, and might imply that the defendant knew there was no probable cause.

"The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it probable, or not probable, are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law; and upon this distinction proceeded the case of *Reynolds* v. *Kennedy*, 1 Wils. 232."

The judgment goes on to point out that the declaration, and the sentence of the court-martial, showed that the plaintiff had in fact disobeyed the order of his commanding officer, although he was justified in disobeying it by the only possible justification, namely, that it was impossible for him to obey. Hence it appeared that the question the court-martial had to decide was whether it was possible or impossible for Sutton to obey the orders he received.

This is not altogether easy to reconcile with the

[1] *Warren* v. *Matthews*, 6 Mod. 73.

judgment of Parker, C. J., in *Jones* v. *Gwynn*, 10 Mod. 214; and Gilb. K. B. 185 (1713). In that case the defendant had indicted the plaintiff for exercising the faculty of a badger without being licensed thereto. It was objected on behalf of the defendant that it appeared from the declaration that the plaintiff was a badger, which was "the affirmative part of the indictment, and he having licence must be shown on the defendant's part," and that therefore the declaration showed reasonable cause for the prosecution. The Chief Justice replied that the offence charged in the indictment was "not the bare using of the faculty of a badger," but doing it unlicensed. If it were otherwise, there would be reasonable cause to indict every badger in England. Might it not be said, in *Johnstone* v. *Sutton*, that the offence charged against Captain Sutton was not merely failing to obey his orders, but voluntarily failing, or failing without justification, to obey them? It is probable that in military law, as administered by courts martial, the presumption is against a defendant who loses his ship or fails from any cause to obey orders, but the result seems to be that if a misfortune such as befell Captain Sutton is *ipso facto* reasonable cause for prosecution, the prosecutor is free to conduct his prosecution with as much malice as he pleases, subject only to liability for false imprisonment. Lords Mansfield and Loughborough conclude this part of their judgment as follows:—"Under all these circumstances, we have no difficulty to give our opinion, that, in law, the commodore had a probable cause to bring the plaintiff to a fair and impartial trial.

"The probable cause goes to both parts of the charge; the disobedience and obstructing the public service. But if it went to the disobedience only, it would equally avail the defendant in this cause. For it is not like the case put of a plaintiff recovering, where he lays, in the same sentence, words actionable, and words not actionable.

"Here the defendant alleges a justification of the arrest, suspension, and trial. If his justification be allowed, there is an end of the action."

In conclusion, the judgment expresses a doubt whether an action for malicious prosecution lies at all against an officer in the King's service for bringing his subordinates on active service to a court martial. The subject is considered in Chapter IX.

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CHAPTER V.

EVIDENCE OF MALICE.

It may be asserted that the word malice, in this connection, has no technical meaning, but may be more aptly defined—or rather explained—as spite, than in any other way. It has often been described as (among other things) an "indirect motive," which is not a particularly happy or intelligible phrase. It matters the less what it is, because juries are at liberty to infer its existence if they think there was no reasonable cause, and they are generally ready to do so. In some of the early cases of malicious indictment, notably *Jones* v. *Gwynn*, 10 Mod. 214 (1713), malice was declared to be a term of law, which appears to have meant that it was a technical way of saying that there was no reasonable cause. In malicious indictment it was enough to say that the defendant indicted the plaintiff *falso et malitiose* without adding *sine rationabili et probabili causâ*, though these latter words were necessary in malicious prosecution. As no one sues now for malicious indictment, the distinction is obsolete, and in any case the ease with which pleadings can be amended would have made it so. The reason why malice has held its place alongside of want of reasonable cause as a part of the cause of action, is the rule that reasonable cause is a question of law.

Substantially it has for a long time been law that malice is a question of fact, and the directions to juries as to what is malice, or what malice is, have not been many.

For reasons which will presently appear, I am of opinion that the whole of the distinction between malice and want of reasonable cause is obsolete, and that it would greatly conduce to a clear understanding of the law of malicious prosecution if the supposed necessity of proving malice were done away with altogether, and the question of reasonable cause frankly recognized as a question of fact for the jury, as I shall argue that it practically has been, at least since the decision of the House of Lords in *Abrath* v. *N. E. R. Co.* In the present chapter I shall merely enumerate the principal cases in which decisions have been given as to what does or does not constitute malice.

In *Chambers* v. *Robinson*, 2 Str. 691 (1732), Chief Justice Raymond "allowed the plaintiff to give in evidence an advertisement put into the papers by the defendant of the finding of the indictment and other scandalous matter . . . as a circumstance of malice."

Sinclair v. *Eldred*, 4 Taunt. 7 (1811), was an action for malicious arrest. The defendant had made an affidavit of debt, and had held the plaintiff to bail, and had afterwards suffered judgment of *non pros.* to go against himself. Lord Mansfield held that this was no evidence of malice, because he might have abandoned his action by reason of the loss of a document or the death of a witness.

In *Snow* v. *Allen*, 1 Star. N. P. C. 502 (1816), which

was tried at *nisi prius* before Lord Ellenborough, the defendant had arrested the plaintiff on a judgment, after having previously arrested his bail. The plaintiff's attorney had warned the defendant's attorney that the arrest would be unlawful, but the defendant's attorney had been otherwise advised by counsel, and relied on *Higgins's case* reported in Cro. Jac. 320. Lord Ellenborough nonsuited, on the ground that however ignorant the defendant's attorney had been, the plaintiff could not recover unless he could "show that the defendant had been actuated by some purposed malice."

The same judge tried the case of *Brookes* v. *Warwick*, 2 Star. N. P. C. 389 (1818), in which the facts were that the defendant, who was an inspector of a bank, brought back from the bank a note stamped "forged" to the plaintiff, who was one of the payees of it. A dispute arose as to who was entitled to keep it, and upon the plaintiff refusing to give it up, the defendant prosecuted him for being feloniously in possession of it. The judge held that there was no probable cause for the prosecution, and directed the jury that "to press a commitment under circumstances like the present was such a *crassa ignorantia* that it amounted to malice."

In *Caddy* v. *Barlow*, 1 Man. & R. 275 (1827), the plaintiff and her brother, both being infants, had been jointly prosecuted by the defendant. At the trial of the action, to which the plaintiff's brother was not a party, Vaughan, B., admitted evidence that the defendant ill-treated the brother in the plaintiff's absence, when both the plaintiff and her brother were in custody,

in order to induce him to prefer a criminal charge against their father. The Court of Queen's Bench (Lord Tenterden, L. C. J., and Bayley, Holroyd, and Littledale, JJ.) held that this evidence was rightly admitted, on the grounds that it was part of the *res gestæ*, and showed *malus animus*, and "unlawful motives" in the defendant.

Mitchell v. *Jenkins*, 5 B. & Ad. 588 (1833), was an action for malicious arrest. The defendant had arrested the plaintiff for a debt of 45*l*., though the defendant was entitled to a set-off of 16*l*., so that in reality only 29*l*. was due. The officer told the plaintiff when he arrested him that he was prepared to accept the smaller sum in satisfaction. Taunton, J., directed the jury that these circumstances showed malice in law, and that they must find for the plaintiff. This was held to be a misdirection. Lord Denman, L. C. J., was of opinion that malice is altogether a question for the jury. Parke, J., said, in the course of his judgment, "The term malice in this sort of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives." I confess that I do not understand what this means. If *malus animus* does not mean spite or hatred, it must, one would think, be a term of art, with some meaning capable of being expressed in English. As to an improper motive, the only improper motive can be a wish to injure the party rather than to vindicate the law, and if that is not spite or hatred it is very like it. As to an indirect motive,

unless it means an improper motive, it is impossible to suggest what it does mean.

Musgrove v. *Newell*, 1 M. & W. 582 (1836), is a case turning chiefly on reasonable cause, and is discussed from that point of view hereafter.[1] In so far as it deals with evidence of malice, the material facts were that, upon the defendant giving the plaintiff in charge, the constable, who knew the plaintiff, offered explanations, to which the defendant refused to listen. Lord Denman said that "malice," "in actions of this nature, was not confined to the ordinary meaning of the word *malice*, but comprehended any improper motive." He directed the jury that if they thought the defendant persisted in his charge from "obstinacy or feelings of wounded pride," and that the defendant either did not believe, or ought not to have believed, in his charge when he preferred it before the magistrate, his conduct was malicious, and they should find for the plaintiff. After a verdict for the plaintiff, the Court of Exchequer made a rule absolute for a new trial, chiefly on the ground of misdirection as to reasonable cause, but also because, in their opinion, there was no evidence of malice. If the case were to occur again, it may be doubted whether it would be decided in the same way. Considering that a jury may infer malice from want of reasonable cause, it is hard to see how a judge can now stop a case on the sole ground that there is no evidence of malice, and the case of *Mitchell* v. *Jenkins*, quoted above, confirms this view.

[1] *Vide post*, p. 44.

In *Haddrick* v. *Heslop*, 12 Q. B. 267 (1848), the main evidence of malice was that the defendant, having been defendant in another suit in which the plaintiff had given evidence against him, upon receiving from someone else an account of the evidence the plaintiff had given, declared that he would indict him for perjury. His informant said that there was no ground for such an indictment, and the defendant answered that even if there were not it would tie up the mouths of the plaintiff, and of the plaintiff in the former action, for a time, and that he (the defendant) would move for a new trial. He did indict the plaintiff, and thence the action. Wightman, J., asked the jury whether they thought he indicted him from malice. The jury answered "that the word malice was strong," but that he indicted him "from an improper motive." The Court of Queen's Bench (Lord Denman, C. J., Coleridge, Wightman, and Erle, JJ.) refused a rule for a new trial applied for on the ground of misdirection.

In *Stevens* v. *Midland Counties Rail. Co. and Lander*, 10 Exch. 352 (1854), the defendant Lander was the superintendent at Derby of the defendant company. The plaintiff had a small piece of the company's tarpauling in his possession, and Lander prosecuted the man from whom the plaintiff had got it for larceny. The grand jury threw out the bill. Lander then insisted on having a warrant against the plaintiff for receiving, "to punish someone in order to deter others, &c." A rule to enter the verdict for the defendants was discharged as to Lander. It was made absolute as

to the company upon other grounds. It was in this case that Baron Alderson expressed the well-known opinion, still held by Lord Bramwell, that no action for malicious prosecution lies against a corporation aggregate, because it has no mind, and therefore cannot be malicious.[1]

The jury may, of course, infer malice from the behaviour of the defendant subsequently to the beginning of the prosecution. *Heath* v. *Heape*, 1 H. & N. 478; 26 L. J. M. C. 49 (1856).

[1] *Vide post*, p. 87.

CHAPTER VI.

EVIDENCE OF WANT OF REASONABLE CAUSE.

THE question of what amounts to proof of a want of reasonable cause for a prosecution is the central difficulty of actions for malicious prosecution. In the present chapter I propose merely to enumerate the decisions which have been pronounced as to what did and what did not establish that the defendant prosecuted without a reasonable cause. In the following chapter I shall trace the decline of the original doctrine, that the question whether the defendant has been shown to have acted without reasonable cause is one for the judge, and the growth of what I hold to be the modern practice that, notwithstanding the embarrassing survival of a rule which has become fictitious, this question is one which juries are called upon to decide, and do decide.

Some account of the case of *Johnstone* v. *Sutton* has been given in a previous chapter. The principal ground of the decision in the defendant's favour was that it appeared from the declaration that the plaintiff was prosecuted for not having obeyed a particular order of his commanding officer, and that he had not in fact obeyed it. Lords Mansfield and Loughborough held that this amounted to reasonable cause for the prosecu-

tion, and that the fact that the plaintiff had had a good defence to the prosecution was immaterial.

Where the prosecution sued for was one for assault, the question of want of reasonable cause will probably turn upon whether the defendant was really the injured party in the assault, or whether he began it. In *Hinton* v. *Heather*, 14 M. & W. 131 (1845), it appeared that the defendant had to some extent provoked and assaulted the plaintiff on his own premises, whereupon the plaintiff threw the defendant downstairs and out of the house, for which the defendant indicted him for assault. Pollock, C. B., directed the jury that if when the defendant began the prosecution he knew that the plaintiff had not exceeded his lawful rights of repelling violence, and turning out an intruder, there was a want of reasonable cause; but that if he knew that the plaintiff had been more violent in putting him out than under the circumstances he had a right to be, there was no want of reasonable cause. Alderson and Rolfe, BB., held this direction to have been right. At the same time they threw some doubt upon an older case of *Fish* v. *Scott*, Peake, 135 (1792). In that case counsel opened the following facts:—Scott hit Fish, and Fish returned the blow. They then went to a field and fought, after which Scott indicted Fish for assault. Upon this opening, Kenyon, C. J., nonsuited, on the ground that the fact of the defendant, who preferred the indictment, having also been the original aggressor, could not amount to a want of reasonable cause.

Scheibel v. *Fairbairn*, 1 B. & P. 388 (1799), is one of

the earlier cases showing that whether or not the defendant had reasonable cause to prosecute depends upon what was his information and belief when he did so. It was an action for malicious arrest, the circumstances being that between the issue of the writ and the arrest the debtor satisfied the debt. It was held that this did not show want of reasonable cause, because the defendant was not bound to send to prevent the writ being executed, and the plaintiff might, before paying, have inquired whether a writ had been taken out or not. Rooke, J., observed that it was a question of law whether the defendant sent to prevent the writ from being executed in reasonable time or not. Probably, at the present time, it would be a question for the jury.

In the closely similar case of *Gibson* v. *Chaters*, 2 B. & P. 129 (1800), Lord Eldon nonsuited; and a rule to set aside the nonsuit was refused.

Ravenga v. *Mackintosh*, 2 B. & C. 693 (1824), is an authority as to the relevance of having taken counsel's opinion before prosecuting. The action was one for malicious arrest; and the evidence was that the defendant, before bringing against the plaintiff the action in which the plaintiff was arrested, took the opinion of "a special pleader of considerable eminence," who advised him that his action against the plaintiff lay; and that if he had him arrested on mesne process an action for malicious arrest would not lie. Abbott, L. C. J., directed the jury, that if they thought the defendant acted in good faith, relying on the opinion of counsel, and believing the plaintiff to be liable to the action,

they should find for the defendant; but if they thought he did not believe in his own cause of action, and relied on counsel's opinion only in so far as it gave him hopes that he would escape an action for malicious arrest, then he had no reasonable cause for the arrest. After a verdict for the plaintiff, it was held that this direction was right, and that the defendant had had no reasonable cause. In the course of his judgment, Bayley, J., said: "I accede to the proposition, that if a party lays all the facts of his case fairly before counsel, and acts *bonâ fide* upon the opinion given by that counsel (however erroneous that opinion may be), he is not liable to an action of this description." Holroyd, J., thought it unnecessary to decide whether a party, influenced by a malicious motive, but believing by reason of counsel's opinion that he has a good cause of action, has reasonable cause for an arrest or not.

The case of *Musgrove* v. *Newell*, 1 M. & W. 582 (1836), has already been considered[1] in its relation to evidence of malice. As regards reasonable cause, it does not appear to be an authority upon which it would be well to rely. The circumstances were: that the plaintiff, who was a respectable person, was waiting for the mail on a bridge, with his servant, at 11 o'clock at night. While he was there, the defendant, who was riding across the bridge, was molested by a drunken man. He went and fetched a constable, and on his return found only the plaintiff, whom he gave in charge. The constable, who knew the plaintiff, assured

[1] *Vide* p. 38.

the defendant that he was a respectable person, and that he, the constable, would be answerable for him. The defendant, however, insisted on having the plaintiff arrested, and charged him before a magistrate with attempted robbery. Lord Denman, C. J., directed the jury that the defendant had reasonable cause for originally charging the plaintiff, but not for persisting in the charge after the constable's explanation. The Court of Exchequer (Lord Abinger, C. B., Bolland, Alderson, and Gurney, BB.) held this to have been a misdirection, on the ground that the constable's explanation could not alter the facts, though it might weaken the inference to be drawn from them; and that, therefore, if there was reasonable cause before the explanation there was also reasonable cause after. This ruling implies a distinction, which later cases, in my opinion, show to be fallacious, between the statements of the constable and the other facts of the case.

That reasonable cause depends upon the state of the defendant's mind, and the information which is present to it, when he institutes or carries on the prosecution, appears clear from *Delegal* v. *Highley*, 3 B. N. C. 950 (1837), which was an action for malicious prosecution and libel. The case was argued on demurrer to the plea to the count for malicious prosecution. This was a plea of justification, and is described in the judgment of the Court of Common Pleas (delivered by Tindal, C. J.) as setting out "the several facts and circumstances attending the transaction out of which the charge before the Lord Mayor arose. To this plea there is a special

demurrer, alleging as one ground of objection that it contains no allegation that the defendant, at the time he caused the charge to be made, had been informed of, or knew, or in any manner acted on, those facts and circumstances." This defect was held fatal to the plea, although it contained the words "wherefore the defendant had reasonable and probable cause to believe, and did believe," that the charge was well founded. If the pleader had specified the time at which the defendant so believed, the allegation would have been sufficient. "The gravamen of the declaration is that the defendant laid the accusation without any reasonable or probable cause operating on his mind at the time." "The defendant[1] would have failed at the trial if he had not proved that the facts of the case had been communicated to him, or, at all events, so much of the facts as would have been sufficient to induce a belief of the plaintiff's guilt on the mind of any reasonable man previous to the charge being laid before the magistrate."

The view of the law suggested by the judgment in *Delegal* v. *Highley* is confirmed by the case of *Broad* v. *Ham*, 5 B. N. C. 722 (1839). In this case the plaintiff had absconded, and the stolen goods were found in his box, but there was also some evidence that, notwithstanding these facts, the defendant had not in fact believed the plaintiff to be guilty, and had prosecuted in order to compel the plaintiff to pay a debt. The judge[2] told the jury that "the plaintiff must show

[1] The report says "plaintiff"; but the meaning is clear.

[2] It does not appear who he was.

malice in the defendant, and want of probable cause for the charge; that the absconding of the plaintiff and the finding the cheque in his box, *primâ facie* afforded probable cause for proceeding against him; but if the jury thought the defendant himself believed the plaintiff had not committed a felony, that was *some* evidence of the absence of probable cause." Upon this direction there was a verdict for the plaintiff, and the Court of Common Pleas refused to disturb it.

To the same general effect is the case of *Turner* v. *Ambler*, 10 Q. B. 252 (1847). The plaintiff, who was the defendant's tenant, in the course of making alterations to the premises, sold, contrary to the terms of his agreement, some fixtures which belonged to the defendant. The defendant thereupon prosecuted him for larceny. The plaintiff suggested that the purpose of the prosecution was to compel him to give up his tenancy. Lord Denman, C. J., "left it to the jury to say whether the defendant had acted maliciously, and, with reference to that question, whether the evidence showed, in point of fact, such want of probable cause for the prosecution as amounted to proof that the defendant had instituted it from motives of malice." On the authority of *Panton* v. *Williams*[1] he reserved "the question of probable cause, as distinct from that of motive, to be decided by himself as a question of law." After a verdict for the plaintiff, the Chief Justice held that want of reasonable and probable cause had not been proved, and entered a verdict for the

[1] *Vide post*, p. 63.

defendant, giving leave to move. The subsequent motion failed. Lord Denman, in delivering the judgment of the Court, said: "The prevailing law of reasonable and probable cause is, that the jury are to ascertain facts, and the judge is to decide whether those facts amount to reasonable and probable cause. But among the facts to be ascertained is the knowledge of the defendant of the existence of those which tend to show reasonable and probable cause, because without knowing them he could not act upon them; and also the defendant's belief that the facts amounted to the offence which he charged, because otherwise he will have made them the pretext for prosecution without even entertaining the belief that he had a right to prosecute. In other words, the reasonable and probable cause must appear not only to be deducible in point of law from the facts, but to have existed in the defendant's mind at the time of his proceeding; and perhaps whether they did so or not is rather an independent question for the jury, to be decided on their view of all the particulars of the defendant's conduct, than for the judge, to whom the legal effect of the facts only is more properly referred." Lord Denman then pointed out that the doctrine laid down in *Broad* v. *Ham*[1]—that the defendant not in fact having believed the plaintiff to be guilty, though there was *primâ facie* cause for his doing so, but having prosecuted from an ulterior motive, was evidence of want of reasonable cause—"must, however, be qualified by the necessity of requiring *proof of the*

[1] *Vide supra*, p. 46.

absence of that belief, when reasonable and probable cause is established. There was none such here." "The unfair use made of the charge may prove malice, as the jury held that it did, but does not raise any inference of a belief that there was no reasonable and probable cause; for the contrary belief is perfectly consistent with malice."

Although what is reasonable cause is a question, to a great extent, of the defendant's belief and information, it seems that his own ignorance in fact of the law which he sets in motion is not reasonable cause. In *Huntley* v. *Simson*, 27 L. J. Ex. 134 (1857), the plaintiff had carried off the defendant's timber under a claim of right, asserting that he had a lien upon it. The prosecution took place three days after the plaintiff, in conversation with the defendant, had asserted his claim of right. Channell, B., held that this showed a want of reasonable cause, and the Court of Exchequer held the direction good. Bramwell, B., said, "It is a blunder on the part of the defendant, and it is one of those blunders which it is just as well that anybody should be punished for." See, also, on this point, *Heath* v. *Heape*, 1 H. & N. 478; 26 L. J. M. C. 49 (1856).

A defendant who is responsible only for part of a prosecution may have reasonable cause for that part, although he might not have had it for instituting the prosecution. In *Weston* v. *Beeman and another*, 27 L. J. Ex. 57 (1857), the plaintiff had been prosecuted for larceny, alleged to have been committed by the sale of cattle which he had assigned to the defendants as security

for an advance. He had a Chancery suit against the defendants for an account pending at the time. The summons had been taken out by the defendants' agent, with the advice of their attorney, but without their authority. The defendants were present at the hearing of the summons, which was dismissed. After a verdict for 20*l.* the Court of Exchequer made absolute a rule to set aside the verdict, and enter it for the defendants. Bramwell and Watson, BB., said, that the defendants had done nothing but attend the summons which had already been taken out, and that until they heard the evidence they knew nothing of the circumstances. Moreover, it was not certain that what the defendant did did not amount to larceny. The evidence did not show that there was no reasonable and probable cause.

Where parish officers summoned a bankrupt before justices for rates due, and finally had him arrested on the justices' warrant of commitment, the facts that they knew of his bankruptcy, and that his examination had been adjourned, and that he had obtained an order protecting him from arrest during such period as the Court of Bankruptcy thought proper under the then law of bankruptcy, and that he claimed freedom under this order from arrest for rates, and contended that the parish ought to prove for the rates under the bankruptcy, were held to be no evidence that the parish officers had not reasonable cause for the arrest, and no evidence of malice. *Phillips* v. *Naylor*, 3 H. & N. 14, and in the Exchequer Chamber, 4 H. & N. 565 (1858-9).

The circumstances relied upon as evidence of want

of probable cause in *Dawson* v. *Vansandeau*, 11 W. R. 516 (1863), were rather peculiar. One Poole was being examined before one of the aldermen of London on a charge of fraudulent bankruptcy. The plaintiff Dawson was the attorney defending Poole, and the defendant was the attorney conducting the prosecution. A witness, B., was called for the prosecution to prove that he had assisted in the removal of Poole's goods. In cross-examination he denied the truth of a written statement signed by him and produced by the plaintiff, and said the plaintiff had made it up. The defendant then gave the plaintiff into custody on a charge of conspiracy to defraud. (This was made the subject of an action for false imprisonment, as to which there was no defence.) The plaintiff was immediately searched, and there was found upon him a letter from Poole, whom he was defending, to him, suggesting that one W., who had helped B. to remove the goods, should be sent away, and inclosing a receipt for money for that purpose which W. was to sign. The defendant then called W., who told the same story as B., and asserted that the proof which he had given to the plaintiff as a witness for Poole had been made up by the defendant. The defendant then preferred a charge of conspiracy against the plaintiff, who was remanded, and subsequently discharged. As far as appears from the report the whole of this episode was irregularly interpolated in the middle of the hearing of the charge against Poole. Upon proof of these facts, Blackburn, J., directed the jury that there was no evidence of reason-

able and probable cause, because, assuming the plaintiff to have been guilty of the conspiracy, B. was his accomplice, and the letter from Poole was not discovered by the defendant until after the plaintiff was taken into custody. Cockburn, C. J., and Crompton and Blackburn, JJ., held that this was a misdirection, because the evidence of an accomplice, though not, generally speaking, enough by itself to procure a conviction, makes a *primâ facie* case which may possibly be reasonable cause for prosecuting; "and here the confirmatory evidence, though not discovered until after the plaintiff had been given into custody, was discovered before the criminal charge was preferred against him with a view to prosecution, and so was admissible as evidence of reasonable and probable cause for that prosecution."

In *Lister* v. *Perryman*, L. R. 4 H. L. 521; L. J. Ex. 177 (1870), the substantial part of the evidence was to the following effect:[1]—The defendant was informed by his coachman Hinton (1) that the plaintiff had some little time before expressed admiration for the defendant's gun, and said he should like to have it; (2) that he had been informed by one Robinson that the defendant's gun was in the plaintiff's barn; (3) that he and Robinson and the plaintiff had gone together to the plaintiff's barn, and the plaintiff had there produced another gun, and said that that was the gun which Robinson had seen in his possession; but Robinson persisted that the gun he had

[1] The action was for false imprisonment, but the law as to what is reasonable cause is the same in such actions as in actions for malicious prosecution.

previously seen was the defendant's. There was contradictory evidence as to whether this was the whole of the information before the defendant; but the jury found as a fact that it was. Lord Chief Baron Kelly directed them that in that case they must find for the plaintiff, because the defendant had acted upon Hinton's account of what Robinson had said, when he might have inquired from Robinson himself whether he was sure the gun he had seen the plaintiff using was the defendant's. The Courts of Exchequer and Exchequer Chamber upheld this ruling; but the House of Lords ordered a new trial on the ground of misdirection. They held, in substance, that though the part of Hinton's communication to the defendant, which is here numbered (2), was hearsay, the parts numbered (1) and (3) were not hearsay, but statements at first hand as to what the plaintiff had said and done, and that therefore it did not follow from the defendant's omission to communicate personally with Robinson that he had no reasonable cause for the prosecution.

The nature of reasonable cause is discussed at considerable length by Hawkins, J., delivering the judgment of the Queen's Bench Division in *Hicks* v. *Faulkner*, 8 Q. B. D. 167; 46 L. T. 127; and 51 L. J. Q. B. D. 268 (1882). In this case the plaintiff was the son of the defendant's tenant. The defendant had taken proceedings against the plaintiff's father in the County Court for rent, in the course of which the plaintiff swore that he had given the defendant the key of the premises. The defendant prosecuted the plaintiff for perjury. At the trial of the action for malicious

prosecution the plaintiff swore that he had delivered the key. The defendant swore that he had not, and produced a diary and other evidence in corroboration of his assertion. Baron Huddleston directed the jury, in substance, (1) that if they thought the plaintiff had delivered the key, and that the defendant, when he prosecuted him, knew that he had done so, they should find for the plaintiff; (2) if they thought the plaintiff did not deliver the key, for the defendant; (3) if the plaintiff did deliver the key, but the defendant had forgotten all about it, and honestly believed that the plaintiff had committed perjury, for the defendant, because in that case the prosecution was not malicious, and was not without reasonable cause; (4) if they could not make up their minds, for the defendant, on the ground that it was for the plaintiff to prove his case. The jury found generally for the defendant. A rule *nisi* having been obtained for a new trial, it was argued that (3) was a misdirection, because if the defendant was led to prosecute through a defect in his own memory he ought to take the consequences. The Divisional Court held, on the authority of *Lister* v. *Perryman*,[1] that a prosecutor may, where it is reasonable to do so, rely on some one else's memory, whence they deduced that he may, *a fortiori*, rely on his own. Mr. Justice Hawkins defined the constituent circumstances of reasonable cause as follows:—

"(1.) An honest belief of the accuser in the guilt of the accused:

[1] *Ante*, p. 52.

"(2.) Such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion:

"(3.) Such secondly-mentioned belief must be based on reasonable grounds—such grounds as would lead any fairly cautious man in the defendant's situation so to believe:

"(4.) The circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused."

Whether the matter gains in clearness from being expressed with this degree of elaboration, I am not certain. Put shortly, Mr. Justice Hawkins's view is, that having reasonable cause to prosecute means believing in the guilt of the accused because of being reasonably convinced of circumstances which afford reasonable ground for that belief. Is this any clearer than the shorter statement, that having reasonable cause for prosecuting means believing honestly and reasonably that the prisoner was guilty? To take a simple illustration: A. sees B. shoot C. through the heart, and prosecutes B. for murder. B. subsequently sues A. for malicious prosecution. The question whether A. had reasonable cause would be divided for determination into four, namely: Did A. honestly believe that B. murdered C.? Was A.'s belief that B. was guilty of murder based on an honest conviction of the existence of the circumstance that he had seen B. kill C. without apparent justification? Was the fact that A., at the time of prosecuting, remembered having seen B. shoot C. through

the heart a reasonable ground for A.'s honest conviction that he had seen B. kill C. without apparent justification? Was the circumstance that A. had seen B. kill C. without apparent justification a reasonable ground for believing in the guilt of B.? I am disposed to suggest that the last three of these questions are an unnecessarily amplified repetition of the first.

In *Abrath* v. *The North Eastern Railway Company*, 11 Q. B. D. 79; *ib.* (C. A.) 440; and (H. L.) 11 Ap. Cas. 247; and 52 L. J. Q. B. 352; *ib.* (C. A.) 620; and (H. L.) 55 L. J. Q. B. 457 (1883-5), which I shall have further occasion to discuss, the defendants, upon the original information of persons asserting themselves to have been the plaintiff's accomplices, and after making certain inquiries and taking legal advice, prosecuted the plaintiff for conspiring to defraud them. The jury found that the defendants took reasonable care to inform themselves of the true state of the case, and that they honestly believed the case which they laid before the magistrates. It was held in the Court of Appeal and the House of Lords that this verdict justified the judge in holding that want of reasonable cause was not proved, and entering the verdict and judgment for the defendants. It is worth noticing that the substantial decision of the House of Lords was that these questions, together with the further question whether the defendants were actuated by any indirect motive in preferring the charge (to which in *Abrath* v. *The North Eastern Railway Company* the jury gave no answer), were the proper questions to leave to the jury.

CHAPTER VII.

REASONABLE CAUSE—A QUESTION FOR THE COURT OR FOR THE JURY?

THE purpose of this chapter is to show, by an account of the decisions on the subject, how the universally acknowledged rule, that the question of reasonable cause is a question for the judge, has been gradually affected by successive judicial decisions until the practical burden of deciding whether or not the plaintiff has shown a want of reasonable cause has been in effect transferred to the jury.

The doctrine that reasonable cause is a question of law finds implicit sanction in the case of *Pain* v. *Rochester and Whitfield*, Cro. Eliz. 871 (41 Eliz.). The action was for "conspiracy for procuring him falsely and maliciously to be indicted." The plea set out the circumstances whereby the defendants came to indict the plaintiff. The Court of Queen's Bench held, on demurrer, that the plea was good, "for their causes of suspicion and absenting of himself [the plaintiff] after notice of the warrant are causes sufficient, and he [the defendant] need not show what evidence was given; and the imprisonment need not be answered, when the indictment is grounded upon good cause."

A hundred and fifty years later was decided *Golding* v. *Crowle*, Sayer's Rep. 1 (1751). It was an action for maliciously prosecuting for perjury. Denison, J., directed the jury that upon the evidence they ought to find for the defendant, but they found for the plaintiff. A rule for a new trial was made absolute.

"*And by the Court:* As the direction of the judge was in a matter of law, and was, in our opinion, very right, the present verdict, which is contrary thereto, ought not to stand. More was proved in this case on the part of the defendant than it was incumbent upon him to prove; for in the case of *Savill* v. *Roberts* it is laid down, that if a bill of indictment have been found a true bill, the defendant, in an action for maliciously prosecuting the indictment, shall not be obliged to prove a probable cause for preferring the bill. But it shall lie upon the plaintiff to prove express malice."[1]

The first appearance which I have been able to find of a tendency to transfer the question of reasonable cause from the judge to the jury is in the case of *Beckwith* v. *Philby*, 6 B. & C. 635 (1827), which was not a case of malicious prosecution, but of false imprisonment. In that case Littledale, J., told the jury that he should find that there was reasonable cause for the arrest and imprisonment if they "thought upon the

[1] This appears to me to be an exaggeration. What Chief Justice Holt said, in *Savill* v. *Roberts*, was that in that particular case, if the grand jury had ignored the bill, the defendant would have been neither "imprisoned nor scandalized nor put to expense," and consequently would have suffered no damage, and could not have recovered. *Vide post*, p. 104.

whole case that the defendants had reasonable cause for suspecting the plaintiff of felony." The Court of King's Bench held this to be a right direction, and refused a rule for a new trial. This decision was followed in *Davis* v. *Russell*, 5 Bing. 354 (1839), where Gaselee, J., similarly directed the jury in an action for malicious prosecution. The Court of Common Pleas (Best, C. J., and Burrough and Gaselee, JJ.) held that this direction amounted to saying, "If you think the defendant acted *bonâ fide*, I am of opinion that he had probable cause for the course he pursued," and was right. About the same time the cases of *Willans* v. *Taylor* were tried. The first trial took place in 1829 (6 Bing. 183). Tindal, C. J., nonsuited, and the Court made a rule absolute for a new trial, on the ground that there was enough evidence of want of reasonable cause to put it on the defendant to prove reasonable cause affirmatively. At the new trial, 2 B. & Ad. 845 (1831), upon evidence being given that on the trial of the indictment against the plaintiff the defendant was in Court, and was called, but did not give evidence, Tindal, C. J., told the jury that they must determine whether the defendant's motive for not appearing when called was that he had sworn falsely when he appeared before the grand jury in support of his bill, and was afraid to do so again; that if that was his motive there was a want of reasonable cause for the prosecution, and if not there was reasonable cause. After a second verdict for the plaintiff, the Court of King's Bench held that this direction was right, for that it was a

question of fact what the defendant's motives were, and a question of law whether they gave him reasonable cause for prosecuting.

In *Eagar* v. *Dyott and Harman*, 5 C. & P. 5 (1831), it appeared that as regarded the defendant Dyott, the plaintiff, whom she had prosecuted for embezzlement, had received money on her account, and had denied to her that he had received it. Lord Tenterden thereupon held that "there was sufficient evidence of reasonable and probable cause," and nonsuited without taking a verdict on the facts.

In *Blachford* v. *Dod*, 2 B. & Ad. 179 (1831), Lord Tenterden also nonsuited. There, however, the facts were admitted on the pleadings. They were that the plaintiff, who was a solicitor, had written to the defendants demanding money, on behalf of a client, and threatening criminal proceedings if it was not sent, and had subsequently taken out a summons against them for false prètences. They retorted by indicting him for demanding money with threats, and this was the prosecution complained of. The Court refused a rule for a new trial. It appears that the money originally demanded by the plaintiff was admitted in the pleadings not to have been in fact due, but I should doubt whether this was an essential part of the grounds of the nonsuit.

The case of *Venafra* v. *Johnson*, 10 Bing. 301 (1833), marks a step in the practical transference of the question of reasonable cause from the judge to the jury. In this case the evidence was that the defendant had heard from his servant that the plaintiff had threatened

him, and had accordingly sworn before a justice that he believed his life to be in danger, whereupon the plaintiff was brought up on a warrant and held to bail. Park, J., considered that reasonable cause for the proceedings had been shown, and nonsuited. The Court (Tindal, C. J., Bosanquet, Alderson, and Park, JJ.), however held, on the authority of *Willans* v. *Taylor*, that it should have been left to the jury whether the defendant believed the charge he had made, and was really in fear of his life, or whether it was colourable only.

In *M'Donald* v. *Rooke*, 2 B. N. C. 217 (1835), the plaintiff, having been dismissed from the defendant's service, took away some of his goods. The defendant wrote to her that if she did not return them he would prosecute. The letter was lost, and the defendant, getting no answer, laid an information against the plaintiff, and caused her to be arrested on a warrant, but subsequently withdrew from the prosecution. Denman, C. J., left the case to the jury, who found for the plaintiff. The defendant moved for a rule on the ground that the judge ought himself to have decided whether there was a want of reasonable cause. The rule was refused, Park, J., observing, "Whenever the question of probable cause is a mixed question of law and fact, it may properly be left to the jury." If this were construed strictly it would, I suppose, include every case in which the facts are not admitted.

The doctrine that having or not having reasonable cause is a question of the defendant's state of mind is

the method whereby the crucial question what conduct is reasonable has been practically transferred to the jury. What was a man's motive is clearly a question of fact, and it is but a step from requiring the jury to find what his motive was to requiring them to find whether it was reasonable. The doctrine that the question is one of motive is well illustrated in *Delegal* v. *Highley*, 3 B. N. C. 950 (1837). The first count of the declaration was for malicious prosecution, and the plea to it, which was a plea in justification, was argued on demurrer. The judgment of the Court, delivered by Tindal, C. J., describes it as setting out "the several facts and circumstances attending the transaction out of which the charge before the Lord Mayor arose. To this plea there is a special demurrer, alleging, as one ground of objection, that it contains no allegation that the defendant at the time he caused the charge to be made, had been informed of, or knew, or in any manner acted on those facts or circumstances. [The plea alleged as follows:—"Wherefore the defendant had reasonable and probable cause to believe and did believe," but did not say that he believed at the time of prosecuting.] The gravamen of the declaration is, that the defendant laid the accusation without any reasonable and probable cause operating on his mind at the time," and "the defendant [the report says plaintiff] would have failed at the trial if he had not proved that the facts of the case had been communicated to him, or at all events, so much of the facts as would have been sufficient to induce a belief of the plaintiff's guilt on

the mind of any reasonable man, previous to the charge being laid before the magistrate."

Panton v. *Williams*, 2 Q. B. 169 (1841), was an action for maliciously prosecuting for forgery. Lord Denman, who had a strong disposition, in cases of this character, to leave as much as possible to the jury, tried the case, and is said by Tindal, C. J., to have "directed the jury that in a case of that sort it was not a question of law but a question of fact whether there was reasonable and probable cause." This was held to have been a misdirection, and so no doubt it would be now, if it was put in that uncompromising fashion. Tindal, C. J., giving judgment in the Exchequer Chamber, laid it down that even where the case is complicated the judge ought to tell the jury what facts, if proved, amount to reasonable cause, and what do not.

In *Michell* v. *Williams*, the plaintiff had been the defendant's tenant, with sporting rights. With the permission or at the instigation of the defendant's agent the plaintiff cut the dam of a fish-pond and took the fish. Disputes afterwards arising, the agent prosecuted the plaintiff under 7 & 8 Geo. 4, c. 30, for doing so. Wightman, J., asked the jury the three questions which follow:—"1. Whether Durance [the agent] acted under the authority of the defendant when he laid the information and prosecuted the proceedings against the plaintiff:"—Answer, yes. "2. Whether Durance gave permission to fish the pond in question by cutting down the bank:"—Answer, yes. "3. Whether the defendant, in taking these proceedings

against the plaintiff, was actuated by evil feelings towards him, and not by a *bonâ fide* and genuine belief that the plaintiff had committed the offence imputed to him :"—Answer, yes. Mr. Justice Wightman, thereupon, held that there was a want of reasonable cause, and required the jury to assess the damages. In support of a rule nisi for a new trial, it was argued that the judge ought also to have asked the jury whether the defendant knew that Durance had given the plaintiff leave to break the dam, but the Court of Exchequer held that the plaintiff had, upon the evidence and the answers of the jury, established a want of reasonable cause, and that it was, therefore, unnecessary to ask the question. This case appears to me to have been in strict accordance with the old rule, the jury finding nothing about the defendant's beliefs or state of mind, except that he was malicious, which would not have been enough if the judge had not found as a fact that there was a want of reasonable cause.

The application of this authority to the leading case of *Turner* v. *Ambler*, 10 Q. B. 252 (1847), of which an account is given in the preceding chapter,[1] led to a statement of the law not very easy to understand. Lord Denman, who tried the case, found that there was no want of reasonable cause, although the jury had found that there was malice, and that after he had "left it to the jury to say whether the defendant had acted maliciously, and, with reference to that question, whether the evidence showed, in point of fact, such a

[1] See *ante*, p. 47.

want of probable cause for the prosecution as amounted to proof that the defendant had instituted it from motives of malice." Judgment was ultimately entered for the defendant on the ground that the judge's finding that there was no want of reasonable cause, was right.

In *Haddrick* v. *Heslop*, 12 Q. B. 267 (1848), for the first time, as far as I know, the jury were expressly made the judges of the "reasonableness" of the defendant's conduct. Wightman, J., asked the jury whether the defendant believed that there was reasonable ground for indicting the plaintiff, and the jury found that he did not. They were also asked "whether he had indicted from malice," and answered "that they thought the word 'malice' was strong, but that they thought the defendant had indicted from an improper motive." Upon these findings the verdict was entered for the plaintiff, and a rule for a new trial for misdirection was refused. Lord Denman said, "It would be quite outrageous if, where a party is proved to believe that a charge is unfounded, it were to be held that he could have reasonable and probable cause."

In *Douglas* v. *Corbet*, 6 E. & B. 511 (1856), Bramwell, B., asked the jury whether they thought the defendant had reasonable and probable cause for his belief that the plaintiff stole a sheep, for the larceny of which he indicted him. The jury found that he had, and the judge then held that under the circumstances there was reasonable cause for the prosecution. There was some evidence of malice, to the effect that the defendant prosecuted in order to put a stop to an action in

the County Court. The Court of Queen's Bench (Coleridge and Crompton, JJ.; Erle, J., *diss.*) discharged a rule for a new trial.

In *Lister* v. *Perryman*,[1] L. R. 4 H. L. 521; L. J. Ex. 177 (1870), the following observations on the respective provinces of judge and jury were made in the judgments delivered in the House of Lords. It will be remembered that the action was one for false imprisonment, but the question of reasonable cause is subject to the same rules in that action as in actions for malicious prosecution.

"The Lord Chancellor (Lord Hatherley): . . . . I certainly do concur in one of the observations made by the learned counsel during the course of his argument—that it is, on the whole, somewhat to be regretted that this question of reasonable and probable cause should not be left to the jury, who heard the evidence and saw the demeanour of the witnesses, and who would, therefore, be in a good position to judge what degree of trust it was reasonable and proper that the person to whom this information was given should repose in his informant. I should have been glad if the duty of deciding this question had not been left to those who have not the same intimate knowledge of the matter which was possessed by persons who heard the whole cause, and were, therefore, in a better position for estimating the amount of credit due, both to the original prosecutor and to the persons who may have been his informants.

[1] *Vide ante*, p. 52.

"Lord Chelmsford:[1]—My Lords, there can be no doubt, since the case of *Panton* v. *Williams*,[2] in which this question was solemnly decided in the Exchequer Chamber, that what is reasonable and probable cause in an action for malicious prosecution, or for false imprisonment, is to be determined by the judge. In what other sense it is properly called a question of law I am at a loss to understand. No definite rule can be laid down for the exercise of the judge's judgment. Each case must depend upon its own circumstances, and the result is a conclusion drawn by each judge for himself, whether the facts found by the jury, in his opinion, constitute a defence to the action. The verdict in cases of this description, therefore, is only nominally the verdict of a jury.

"Lord Westbury:[3]—My Lords, I have very few words to add. The existence of 'reasonable and probable cause' is an inference of fact. It must be derived from all the circumstances of the case. I regret, therefore, to find the law to be that it is an inference to be drawn by the judge, and not by the jury. I think it ought to be the other way.

"Lord Colonsay:[3]—My Lords, I have listened to this case with much interest, finding myself placed in what is to me the somewhat novel position of having to deal with the question of want of reasonable and probable cause as a question of law for the Court, and not a question of fact for the jury. I have frequently

[1] At p. 535. [2] 2 Q. B. 169. [3] At p. 538.

had to deal with cases of this kind in the other end of the island; but there this question of want of reasonable and probable cause is treated as an inference in fact to be deduced by the jury from the whole circumstances of the case, in like manner as the question of malice is left to the jury."

This is the last case in which it is laid down without reserve that the question, whether the defendant's behaviour was "reasonable," must be decided by the judge. The two following cases show how judicial ingenuity has devised a method whereby the wishes unanimously expressed in the judgments of the House of Lords in *Lister* v. *Perryman* have been practically gratified.

The case of *Hicks* v. *Faulkner*, 8 Q. B. D. 167, and 51 L. J. Q. B. 268 (1882), has been treated of at some length in the preceding chapter. The question of reasonable cause is divided, in the judgment delivered in the Divisional Court by Hawkins, J., into four parts, namely:—

1. An honest belief of the accuser in the guilt of the accused;
2. Such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion;
3. Such secondly-mentioned belief must be based upon reasonable grounds—that is, such grounds as would lead any fairly cautious man in the defendant's situation so to believe;

4. The circumstances so believed and relied on by the accuser must be such as to amount to reasonable ground for belief in the guilt of the accused.

The judgment proceeds: "The belief of the accuser in the guilt of the accused [No. 1], his belief in the existence of the facts on which he acted [No. 2], and the reasonableness of such last-mentioned belief [No. 3], are questions of fact for the jury, whose findings upon them become so many facts, from which the judge is to draw the inference, and determine whether they do or do not amount to reasonable and probable cause. This, also, is an inference of fact, not of law, as is sometimes erroneously supposed; and the judge is to draw it from all the circumstances of the case." *Lister* v. *Perryman*, *per* Lords Chelmsford and Westbury.

If reasonable cause consists of Nos. 1, 2, 3, and 4, and Nos. 1, 2, and 3 are for the jury, nothing is left for the judge except No. 4. I cannot, as I have stated already,[1] understand what meaning No. 4 can have except what has already been included in Nos. 1, 2, and 3. I must, therefore, admit that I cannot imagine a case in which the jury would find everything that Mr. Justice Hawkins would leave to them in favour of the plaintiff, and the judge would hold that there was no want of probable cause, unless the judge and jury took directly opposite views of the case.

The importance of *Hicks* v. *Faulkner* was greatly

[1] *Vide ante*, p. 55.

diminished by the decision, about the same time, of *Abrath* v. *N. E. Rail. Co.*, 11 Q. B. D. 79; *ib.* (C. A.) 440; and (H. L.) 11 App. Cas. 247; and 52 L. J. Q. B. 352; *ib.* (C. A.) 620; and (H. L.) 55 L. J. Q. B. 457 (1883-5), which appears to me to establish definitely the boundary between the provinces of the judge and the jury as to reasonable cause, as well as determining some other points previously more or less in dispute as to the law of actions for malicious prosecution.

The action was tried at Durham Summer Assizes, 1882, before Mr. Justice Cave. The following is the statement of the facts set out in the report of the hearing in the Court of Appeal (11 Q. B. D. 441):—

"On the 10th of September, 1880, a collision occurred at Ferry Hill Station, on the defendants' railway, and one M. McMann alleged that he had thereby sustained injuries. McMann was attended by the plaintiff, G. A. Abrath, a doctor of medicine and surgery, and McMann brought an action against the defendants to recover damages. The action by McMann stood for trial at the Northumberland Summer Assizes, 1881; but it was settled by the defendants paying to the plaintiff McMann 725*l.* damages and 300*l.* costs. After the settlement, the directors of the defendants' company received certain information from Rayne, a surgeon, who was the medical adviser of the railway company in reference to accidents, and who was authorized to employ detectives on behalf of the company. The directors thereupon employed a solicitor named Dix to see certain persons and take their statements. Some of these

persons were relatives of McMann, and others were well acquainted with him, and their statements, if true, showed that a fraud had been perpetrated on the defendants; that McMann had not been seriously injured in the collision; that the injuries of which McMann had complained had been wilfully produced by the present plaintiff, Dr. Abrath, with the consent of McMann, for the purpose of getting money from the defendants. These statements were submitted to the directors of the defendants' company, who thereupon ordered that the opinion of counsel should be taken, and counsel advised that there was a good case for prosecuting a charge of conspiracy against McMann and Abrath, his medical adviser. Two eminent medical men were of opinion that the case of the alleged injuries to McMann was an imposture. Thereupon the defendants caused an information to be laid before justices against the plaintiff, Dr. Abrath, on a charge of conspiracy to cheat and defraud the defendants. He was committed for trial and was tried in January, 1882, and acquitted. . . . He thereupon commenced the present action, and at the trial certain witnesses were called who were acquainted with McMann, and gave evidence to show that his injuries were real and not feigned, and these witnesses had not been seen on behalf of the defendants before they instituted proceedings against the plaintiff. It was also shown that the persons on whose statements the directors had ordered the prosecution to be instituted against the plaintiff were of bad character, and one of them had been convicted several times, and also their

own statements, if true, established that they were accomplices with the plaintiff and McMann in the conspiracy. For the defendants it was not disputed that the plaintiff was innocent of the conspiracy; but it was contended that they were justified in instituting the prosecution upon the faith of the statements laid before the directors."

These being the principal facts, Cave, J., addressed the jury, in the course of his summing-up, as follows:—

"I think the material thing for you to examine about is, whether the defendants in this particular case took reasonable care to inform themselves of the true facts of the case. That, I think, will be the first question you will have to ask yourselves—did they take reasonable care to inform themselves of the true facts of the case? Because, if people take reasonable care to inform themselves, and notwithstanding all they do, they are misled, because people are wicked enough to give false evidence, nevertheless they cannot be said to have acted without reasonable and probable cause; with regard to this question, you must bear in mind that it lies on the plaintiff to prove that the railway company did not take reasonable care to inform themselves. The meaning of that is, if you are not satisfied whether they did or not, inasmuch as the plaintiff is bound to satisfy you that they did not, the railway company would be entitled to your verdict on that point. Then there is another point, and that is, when they went before the magistrates, did they honestly believe in the case which they laid before the magistrates? If I go before

magistrates with a case which appears to be good on the face of it, and satisfy the magistrates that there ought to be a further investigation, while all the time I know that the charge is groundless, then I should not have reasonable and probable cause for the prosecution. Therefore, I shall have to ask you that question along with the others, and according as you find one way or the other, then I shall tell you presently, or I shall direct you, whether there was or was not reasonable and probable cause for this prosecution. If you come to the conclusion that there was reasonable and probable cause—that is, that the defendants did take care to inform themselves of the facts of the case, and they did honestly believe in the case which they laid before the justices, then I shall tell you, in point of law, that this amounts to reasonable and probable cause; and in that case the defendants will be entitled to your verdict; if, on the other hand, you come to the negative conclusion—if you think that the defendants did not take reasonable care to inform themselves of the facts of the case, or that they did not honestly believe the facts which they laid before the magistrates, then in either of those cases you will have to ask yourselves this further question, Were they in what they did actuated by malice—that is to say, were they actuated by some motive other than an honest desire to bring a man whom they believed to have offended against the criminal law to justice? If you come to the conclusion that they did honestly believe that, then they are entitled, again, to your verdict; but

if you come to the conclusion that they did not honestly believe that, but that they were actuated by some indirect motive other than a sincere wish to bring a supposed guilty man to justice, then the plaintiff is entitled to your verdict; and then it will become necessary to consider the question of damages." The learned judge, after commenting upon the evidence, proceeded: "Now, gentlemen, these are the circumstances which, I think, point to the question of reasonable care having been taken: Did they take, or did they not take, reasonable care in informing themselves of the true facts of the case? As I have said just now, the plaintiff has to satisfy you that they did not; if you are satisfied that they did, you ought to answer that question in favour of the defendants. If, however, you are satisfied that they did not take reasonable care, then you must answer it for the plaintiff." In conclusion, Mr. Justice Cave left three questions to the jury. These were:—

First, did the defendants take reasonable care to inform themselves of the true state of the case?

Secondly, did they honestly believe the case which they laid before the magistrates?

Mr. Justice Cave directed the jury that if they answered both these questions in the affirmative, that would be a verdict for the defendants; but that if they answered one or both in the negative, they must answer the third question—"Were the defendants actuated by any indirect motive in preferring the charge?" and

that if they answered either or both of the first two in the negative, and the third in the affirmative, the verdict would be for the plaintiff, and they must assess the damages. They answered the first two questions in the affirmative; Mr. Justice Cave held that this amounted to a verdict for the defendants, and gave judgment for the defendants accordingly.

I maintain that this came practically to the same thing as leaving to the jury the two questions whether there was reasonable cause, and whether there was malice. Mr. Justice Cave expressly said that if the jury found that the defendants did not take reasonable means to inform themselves of the true facts of the case, and acted maliciously, that would be a verdict for the plaintiff. He did not himself decide upon the evidence that no want of reasonable cause was shown, as, if I may respectfully say so, the judges used to in the earlier cases, and did in *Lister* v. *Perryman*. He accepted the decision of the jury that the means of informing themselves adopted by the defendants were reasonable, and I cannot doubt that he would equally have accepted it if it had been the other way. Can any one imagine a case in which a judge, after leaving to the jury the questions left in this case, and being informed that in their opinion the means of informing himself adopted by the defendant were not reasonable, or that the defendant did not honestly believe in his case, would hold that no want of reasonable cause had been shown, or *vice versâ?* The great importance of Mr. Justice Cave's summing up, and the questions that he left to the jury,

consists in the fact that they are practically applicable to every action for malicious prosecution, and that the Court of Appeal and the House of Lords decided in effect that the summing up was good law, and that the questions left to the jury were the right questions to leave to them.

I may add that, through the kindness of my friend Mr. MacClymont, I have had an opportunity of reading the short-hand report of the summing up, which was included in the printed case used in the appeal to the House of Lords. It contains simple examples, suggested by the judge, of what obviously would, and what obviously would not, be reasonable means of informing himself as to the true facts of the case adopted by the prosecutor, and it expressly asserts, again and again, that the question whether the means of informing themselves in this case adopted by the defendants were reasonable or otherwise, is the principal question which the jury have to decide.

After judgment for the defendants at the trial the plaintiff obtained a rule in the Divisional Court for a new trial on the ground of misdirection. After argument (11 Q. B. D. 79) the rule was made absolute by Grove and Lopes, JJ., on the ground of misdirection as to the burden of proof, a question which is discussed in a subsequent chapter.[1] The defendants appealed to the Court of Appeal (11 Q. B. D. 440), where the judgment of the Divisional Court was reversed, and that of Mr. Justice Cave restored. As in the Divisional Court, the

[1] *Vide post*, p. 104.

question principally argued was that of the burden of proof; but the judgments incidentally contain the proposition that the questions which Cave, J., left to the jury were proper questions to leave to them. At the hearing of this appeal it was ordered by the Court, with the consent of the parties, "that the plaintiff should be at liberty to appeal from the judgment of Mr. Justice Cave, and to raise the questions whether there was reasonable and probable cause for instituting the prosecution, and whether the judgment had been rightly entered by Cave, J., on the findings of the jury." Lord Esher, M. R., said (at p. 451): " . . . if the direction of Cave, J., to the jury was simply that it was a necessary part of the question whether there was a want of reasonable and probable cause for instituting the prosecution against the plaintiff, that it should be decided whether reasonable care had been taken by the defendants to inform themselves of the true state of the case, and that the burden of proving that minor proposition, as well as the whole proposition, lay upon the plaintiff, it is a direction which cannot be impeached." In direct reference to the plaintiff's appeal against the judgment, the Master of the Rolls summarized the evidence in a few lines, and said that upon that, and upon the findings of the jury that the defendants had taken reasonable means to inform themselves of the true state of the case, and had honestly believed the case they laid before the magistrates, he was satisfied that no want of reasonable cause had been proved.

The substance of the judgments in the House of Lords

appears to me, as I have already stated, to be that the case was rightly left to the jury. In order to support this contention I reproduce here the whole of the judgments as reported, except the greater part of Lord Bramwell's, which consists of an elaborate declaration that a corporation cannot be guilty of malice—a subject dealt with in a subsequent chapter[1]—and the first paragraph of Lord Fitzgerald's, in which his lordship refers to the same topic:—(11 App. Cas. at p. 249).

"EARL OF SELBORNE:—My Lords, the argument of the learned counsel for the appellant has cleared up any difficulty which there might have been as to the real grounds on which we should decide this case. The question is really one of the weight of evidence, and nothing else. The burden of satisfying the jury that there was no reasonable and probable ground for the prosecution lies upon the plaintiff. It is not now seriously disputed that it does.

"The learned judge having left two questions of fact to the jury, they found, first, that proper care had been used by the prosecutors to inform themselves of the facts; and, secondly, that the prosecutors honestly believed the case which they laid before the magistrates.

"In my judgment the learned judge did not misdirect the jury, and the Court of Appeal were right in their view of the law; and the only question is, is there any ground for saying that upon the weight of evidence the jury miscarried, and that a new trial ought to be directed? Speaking for myself, I cannot imagine a more

[1] *Vide post*, p. 91.

hopeless case in that point of view. The railway company had to determine whether or not they would institute this prosecution; and the evidence given by the gentleman who was acting for them in the matter is, to my mind, as completely sufficient to negative the idea of the absence of reasonable and proper care on the part of the company to inform themselves of the facts as anything for the purpose of an action of this sort can be.

"The statements of certain persons were obtained, carefully considered, and laid before counsel, and counsel advised a prosecution upon those materials. A prosecution having been instituted, it was thought by the magistrates that the preponderance of evidence was such that they ought to send the case for trial. Taking the evidence as it was presented to the railway company, to those who advised them, and to the magistrates, it was a body of evidence which, if believed, tended to prove the charge, and justified those who believed it in making the charge in perfect good faith. How it can be said that taking such a body of evidence as that, without the suggestion, much less proof, of the use of any fraudulent or improper means to obtain it, shows a want of reasonable care on the part of the company to inform themselves about the facts, I cannot imagine. I cannot conceive better *primâ facie* evidence of care in that respect."

[His Lordship then discussed the evidence in detail, and concluded thus:—]

"So far from thinking that there is a preponderance of

evidence against reasonable and probable cause, my doubt is rather on the other side, whether, on the whole evidence, there was really anything to go to the jury in favour of that conclusion. I move your Lordships that the order appealed from be affirmed and the appeal dismissed with costs.

"LORD WATSON:—My Lords, I am of the same opinion. I have no doubt that the learned judge rightly directed the jury, and that there is nothing to show that the defendants acted without reasonable or probable cause. The authorities cited by Mr. MacClymont in the course of his able argument do not form, in my opinion, any exception to the ordinary rule that the burden of proof lies upon the plaintiff. Some of them establish that a slight amount of evidence may be enough to launch the plaintiff's case, when the whole circumstances of the case are in themselves sufficient to raise a presumption of want of reasonable care on the part of the prosecutor, but that is not the case here.

"As to the finding of the jury being contrary to the evidence, I concur in the observations which have been made by the noble and learned Earl. I entertain considerable doubt whether there was any evidence to go to the jury. It is unnecessary to determine that point; but of this I feel persuaded from the argument which we have heard, that, looking at the evidence which was before the jury, they could not honestly and fairly have given any other verdict.

"LORD BRAMWELL:— . . . . . .
But assuming that that difficulty [the question whether

the action lies against a corporation] did not exist, there is no absence of reasonable and probable cause in this case. I doubt very much whether Cave, J., need have left to the jury the question whether reasonable care had been used. I doubt it very much indeed. I doubt very much whether he might not—I will not say ought not—have said to the jury, 'If you are of opinion that these directors honestly believed the statements that were laid before them, and honestly acted upon the opinions that were given to them, there was not only no absence of reasonable and probable cause, but it existed in abundance.' However, he did put the question, and the jury did answer it; and it does seem to me, I must say, to be one of the strongest cases of an unfounded action that was ever brought, even for malicious prosecution.

"Lord Fitzgerald :— . . . . . .
To deal with the case as it really comes before us, I do not entertain any doubt that the issue upon the question of probable cause, as well as upon the question of malice, lies upon the plaintiff in this sense, that the plaintiff is bound to offer evidence sufficient, if uncontradicted, to sustain both these issues on his behalf. At the close of the plaintiff's case, supposing it had closed there, and no evidence had been offered directly on behalf of the defendants, was there such a case upon the two issues as that it could be said that there was evidence to sustain the issues for the plaintiff? I so far differ from the opinion of my noble and learned friend that I think there was evidence upon both issues, if uncontroverted,

from which the jury might have found, and the judge who presided, drawing the proper inference from the facts himself might have found, in the plaintiff's favour. It is unnecessary for me to point out in detail what that evidence was. But upon the whole of the evidence produced on both sides the learned judge put two questions —and, in my opinion, two very proper questions—to the jury for the purpose of informing his mind as to what was the proper inference for the judge to draw upon this very question of the presence or absence of reasonable cause.

"The jury answered the two questions in the defendants' favour; and though possibly I myself might have come to a different conclusion upon the first question, I cannot say that the verdict was an unreasonable one, or so far against the weight of evidence that it ought not to stand.

"As to the alleged misdirection, I do not think that the summing up of the learned judge, taken as a whole, and together with the questions he put, could have misled the jury."

I can put no other construction upon the whole of the judgments in this case than that every judge who tries an action for malicious prosecution is entitled—to put it at the lowest—to sum up in the sense of the passages quoted above from the summing up of Mr. Justice Cave, and to put to the jury the two questions which Mr. Justice Cave devised, namely—

1. Did the defendant take reasonable care to inform himself of the true state of the case?

2. Did he honestly believe the case he laid before [whatever the tribunal may have been]?

These two seem to me to cover the whole ground of reasonable cause. If the jury answer them both "yes," the judge will be justified in holding that want of reasonable cause has not been proved. If the jury answer either question "no," the judge will be justified in holding that it has.

Some judges have already availed themselves of this precedent. I do not see why it should not become invariable, except in cases where the judge prefers to decide the question of reasonable cause for himself in the old-fashioned way.

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CHAPTER VIII.

MALICE A QUESTION FOR THE JURY.

THERE has never been any doubt that the question whether a prosecution was malicious is one solely for the jury. In *Mitchell* v. *Jenkins*, 5 B. & Ad. 588 (1833), which was an action for malicious arrest, Taunton, J., directed the jury that there the defendant's conduct amounted to malice in law, and that they must find for the plaintiff. The Court of King's Bench held this to have been a misdirection, as the question of malice was one altogether for the jury. Parke, J., observed that the jury, when directed that there was no reasonable cause, might infer from that that there was malice. The rule is so well ascertained that it is not necessary to multiply authorities, but see Chapter V., on Evidence of Malice.

CHAPTER IX.

WHO ARE LIABLE TO BE SUED.

The old action of conspiracy could not be brought against one person only (22 As. 77 (1304)). This was one of the reasons for the introduction of the action on the case, which was the early form of the action for malicious prosecution. It lay, as an action now lies, against any private prosecutor, with a few simple exceptions. I know of no instance in which any person has been sued for a prosecution ordered by any officer of state, and I doubt if such an action would lie. Prosecutions may be directed by a Secretary of State, the Attorney-General, or the Director of Public Prosecutions, and I know of no direct authority as to whether or not an action for malicious prosecution would lie against any of these officers for what they had done in their official capacities.

No action lies against a grand juror for finding a bill (22 As. 77 (1304); *Floyd* v. *Barker*,[1] 6 Rep. XII. 23 (1608)), nor against a judge or justice of the peace for anything done openly in Court, or for anything done out of Court in the discharge of his duty (*Floyd* v. *Barker*, *sup.*). In *Girlinton* v. *Pitfield*, 1 Vent. 47 (1669), it was proved that the defendant was a justice of the

[1] This case was decided in the Star Chamber, temp. Jac. I.

peace who had "procured some as witnesses to appear against the plaintiff, and his own name was endorsed on the indictment to give evidence." The Court of King's Bench held that the action did not lie, because the defendant, as a justice, was bound to cause any evidence that he knew of to be given.

It seems probable that no action for malicious prosecution will lie against an officer in the naval or military service of the Crown for what he does abroad in time of war, or at the suit of any other person in such service for anything done by him as such officer when both are subject to the articles of war. *Barwis* v. *Keppel*, 2 Wils. 314 (1766); *Johnstone* v. *Sutton*, 1 T. R. 493 and 510 (1786). See also *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94; and 39 L. J. Q. B. 53 (1869), and the cases there cited.

It is doubtful whether a corporation aggregate can be sued for malicious prosecution. There is authority both ways, but not much of it, the question having been argued and determined once only, by Mr. Justice Fry on further consideration.[1] This is also the only occasion that I am aware of in which damages have been recovered against a corporation for this wrong. An account of the decisions bearing on the point follows. It may be observed that no difficulty arises about false imprisonment, as that tort includes a trespass.

In *Stevens* v. *The Midland Counties Rail. Co.*, 10 Exch. 352 (1854), a man in the employ of the company had

[1] *Edwards* v. *M. Rail. Co.*, 6 Q. B. D. 287; *vide post*, p. 88.

prosecuted the plaintiff without their orders, and the plaintiff had obtained a verdict for 100*l.* against both the company and their servant. As against the company the Court of Exchequer set aside the verdict. Alderson, B., said: "It seems to me that an action of this kind does not lie against a corporation aggregate; for, in order to support the action, it must be shown that the defendant was actuated by a motive in his mind, and a corporation has no mind." Platt and Martin, BB., both thought that there was no evidence of a prosecution by the company, but both expressly declined to give any opinion as to whether such an action could be maintained against a corporation.

Walker v. *S. E. Rail. Co.*, L. R. 5 C. P. 640; 39 L. J. C. P. 346 (1870), was an action against a railway company for false imprisonment and malicious prosecution. The Court of Common Pleas held that there was reasonable cause for the prosecution, and no point was raised as to whether the action lay.

The Bank of New South Wales v. *Owston*, 4 Ap. Cas. 270 (1879), was an appeal by the defendant company to the Privy Council. The action was for a malicious prosecution, alleged to have been instituted by the acting manager of the bank. The judge told the jury "that it was to be inferred, from Mr. Wilkinson's position as manager, that he had sufficient power under the circumstances for directing a prosecution." The colonial Court discharged a rule for a new trial, obtained on the ground, among others, that this was a misdirection. The Judicial Committee made the rule absolute,

after some hesitation as to whether they would not nonsuit, because it appeared to them, from all the evidence, that instituting prosecutions was outside the scope of the acting manager's employment, and that there were no circumstances of instant urgency such as might give him authority. The question whether the action lay does not appear to have been raised.

In *Edwards* v. *The Midland Rail. Co.*, 6 Q. B. D. 287; 50 L. J. Q. B. 281 (1880), the action was tried at the Stafford Assizes before Fry, J., the facts being that a detective in the employment of the defendant company had prosecuted the plaintiff for theft. Fry, J., upon a verdict for the plaintiff, reserved two questions for further consideration,—1st, whether an action for malicious prosecution lay against a corporation, and 2nd whether the employment of police was an act within the scope of the company's incorporation. The judgment was as follows:—

"I am asked to decide this question, as it were, by way of rehearsal, as it is intended to carry it to a higher tribunal. [Unfortunately this intention does not seem to have been carried into effect.] I must therefore express my opinion upon it. The question is, whether a railway company can be made liable in an action for malicious prosecution. The malice, in order to found such an action, need not be express malice; but it may be implied from the wrongful action without just cause or excuse. Now it is a maxim that a corporation has no mind, no *mens rea*, therefore they cannot be guilty of malice. Can they, therefore, escape the consequences

of an action which in the case of an ordinary person would be held to imply malice? Mr. Hill suggests to me the case of partners who would be held to be individually liable for an action maliciously instituted by the partnership, and the subsequent incorporation of the partnership into a company. Can it be said that the company, consisting of the same persons as before, is not to be made liable for the same wrongful action? It would be strange if it were so, though I must not forget that the individuals who directed such a wrongful action on the part of the company would be personally liable.[1]

"Those who deny that the company can be made liable rely principally on Baron Alderson's judgment in *Stevens* v. *Midland CountiesRail. Co.*,[2] where he held that in order to support such an action it must be shown that the defendant was actuated by a motive in his mind, and that a corporation has no mind. The two other judges, Barons Platt and Martin, did not agree[3] with Baron Alderson's reasons, but decided in the company's favour on other grounds.

"Has Baron Alderson's opinion, which in that case stands alone, been followed by other judges? In *Rex* v. *City of London*, which is cited in a note to *Whitfield* v. *South Eastern Rail. Co.* (E. B. & E. 122), it was held

[1] This does not read like a considered judgment. Surely it would be not only strange, but contrary to every principle of law, if a company, sued as such, were to be held liable, in the absence of contract, for a wrong committed by some one else before it was in existence.

[2] 10 Ex. 352; *vide ante*, p. 87.

[3] This is strictly accurate. They did not disagree.

on demurrer that an action would lie against the Corporation of the City of London for maliciously publishing a libel; and though that decision is not of the greatest weight, being affected no doubt by political as well as legal considerations, still it was assented to by Chief Justice Saunders, an able and experienced judge. In *Yarborough* v. *Bank of England* (16 East, 6), Lord Ellenborough referred to an earlier case of *Argent* v. *Dean and Chapter of St. Paul's* (16 East, 7, n.), and said that the instances of actions against corporations for false returns to writs of mandamus must be numberless. Again, in *Whitfield* v. *South Eastern Rail. Co.* (E. B. & E. 121), Lord Campbell says that 'the ground on which it is contended that an action for libel cannot possibly be maintained against a corporation aggregate fails,' and 'considering that an action of tort and trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate both for commission and omission, to be followed up by fine, though not by imprisonment, there may be great difficulty in saying that, under certain circumstances, express malice may not be imputed to and proved against a corporation.' In *Green* v. *London General Omnibus Co.* (7 C. B. N. S. 290, at p. 301), it was held that a corporation aggregate may be liable to an action for intentional acts of misfeasance by its servants, provided they are sufficiently connected with the scope and object of its incorporation. There Chief Justice Erle says, 'The ground of the demurrer is, that the declaration charges a wilful and intentional wrong, and that the

defendants, being a corporation, cannot be guilty of such a wrong, and therefore the action will not lie.' In the case before me, it is similarly argued that a corporation cannot act maliciously or intentionally, because malice and intention imply mind. Chief Justice Erle continues, 'The doctrine relied on, that a corporation having no soul cannot be actuated by a malicious intention, is more quaint than substantial.' In other words, the *ratio decidendi* of Baron Alderson was in this case disregarded; and as his decision has not been followed in English Courts, I am at liberty to decide in conformity with the later decisions; and I hold, therefore, that the action will lie in this case.

"The next question is, was this act done within the scope of the incorporation of the company? I hold that it was; the company may restrain the commission of crime on their railways; and the observations made in *Goff* v. *Great Northern Rail. Co.* (30 L. J. Q. B. 152) show that a company so acting may be responsible for an illegal arrest; I give judgment, therefore, for the plaintiff, with costs."

In *Abrath* v. *The North Eastern Rail. Co.*, 11 Ap. Cas. 247 (1886), the question was not argued, but the judgment delivered by Lord Bramwell was almost wholly devoted to it. I therefore reproduce it here, all except the concluding paragraph, which dealt with the other aspects of the case.[1]

"[2] My lords, I am of opinion that no action for a

[1] *Vide ante*, p. 80.

[2] 11 Ap. Cas. at p. 250.

malicious prosecution will lie against a corporation. I take this opportunity of saying that as directly and peremptorily as I possibly can; and I think the reasoning is demonstrative. To maintain an action for a malicious prosecution it must be shown that there was an absence of reasonable and probable cause, and that there was malice or some indirect and illegitimate motive in the prosecutor. A corporation is incapable of malice or of motive. If the whole body of shareholders were to meet, and in so many words to say, 'prosecute so-and-so, not because we believe him to be guilty, but because it will be for our interest to do it,' no action would lie against the corporation, though it would lie against the shareholders who had given such an unbecoming order. If the directors, even, by resolution at their board or by order under the common seal of the company, (I am putting the case plainly, in order that there may be no mistake about it,) were maliciously, with a view of putting down a solicitor who had assisted others to get damages against them, to order a prosecution against that man, if they did it from an indirect or improper motive, no action would lie against the corporation, because the act on the part of the directors would be *ultra vires;* they would have no authority to do it. They are only agents of the company; the company acts by them, and they have no authority to bind the company by ordering a malicious prosecution.

"I say, therefore, that no action lies, even if you assume the strongest case, namely, that of the very

shareholders directing it, or the very directors ordering it, because it is impossible that a corporation can have either malice or motive; and it is perfectly immaterial that some subordinate officer or individual or individuals of the company have such malice or motive. In the case which I put, an action would lie against the directors personally who had ordered an improper prosecution. It may be that no action would lie against any subordinate who had malice and who had not ordered or caused or procured the prosecution; because, although the two ingredients existed which are necessary for the maintenance of such an action, that is to say, malice and the absence of reasonable and probable cause, yet in the case which I surmise the man would not be a prosecutor; and unless you find the absence of reasonable and probable cause and malice in him who is the prosecutor, an action is not maintainable. It is not enough, therefore, to show that there was an absence of reasonable and probable cause, and that the subordinate had malice; not that I for a moment suggest that that is the case here.

"In my opinion, this is not merely what is called a technical point—although if a point were untechnical it would be very objectionable. This is a substantial objection; because every one, or every counsel and solicitor listening to me, knows that the only reason why a railway company is selected for an action of this sort is, that a jury would be more likely to give a verdict against a company than against an individual. Everybody knows it, and perhaps there is a sort of hope of

confusion; it is said, 'The man was innocent; somebody ought to be punished for it; here is a railway company; there was an improper motive;' and so there is a jumble; the case gets before a jury, and a railway company is exactly the party to have damages awarded against it. If ever there was a necessity for protecting persons it is in an action for malicious prosecution, and for two reasons. First of all, the prosecutor is a very useful person to the community. We have something in the nature of a public prosecutor, but everybody knows that the greater number of prosecutions in this country are undertaken not by the State but by private persons, or, as in this case, corporations.

"One may venture to quote Bentham, even upon this matter. He said that laws would be of very little use if there were no informers, and that it is necessary, for the benefit of the public, that people when they prosecute, and prosecute duly, should be protected. And there is an additional reason. A man brings an action for a malicious prosecution; he gives evidence which shows, or goes to show, that he is innocent. You may tell the jury over and over again that that is not the question, but they never, or very rarely, can be got to understand it. They think that it is not right that a man should be prosecuted when he is innocent, and in the end they pay him for it. It is, therefore, all-important that these actions should not be permitted to be brought against persons or bodies or others who are not properly liable in respect of them.

"It may be said, 'Well, but this is rather hard upon

a man who has been prosecuted and improperly prosecuted.' That is to say, the corporation is innocent, but its officers are guilty. But the same thing happens in the case of an individual prosecutor. A man receives false information; he prosecutes upon that information. The person who gave him the information is not liable, because he did not prosecute. He may be liable for the untrue statement, because it may be slander, in the same way as he would be liable if he charged an indictable offence against a person; or possibly he may be liable for having procured the prosecution; and it may be that in such a case as this some of the people employed by the company were actuated by an indirect motive. I do not say they were—it is impossible to say so—but what I say is, that it is no harder upon a man that he has no remedy against a public company who has prosecuted him, when the servants of the company have been malicious, than it is that there is no remedy against any individual man who has prosecuted, he having no malice, but somebody who gave him information having malice.

"It is said that this is an old-fashioned sort of notion. It is; but this opinion is one that I have entertained ever since I have known anything about the law; and though it is an old-fashioned one, I trust that it is one which will not die out, for the reasons which I have given. But it is said 'But a variety of actions have been allowed against corporations which did not formerly exist.' I deny it. It is certain that a corporation may

order a thing to be done which is a trespass, because there the act of those who act for the corporation is not *ultra vires*. For instance, take the case of false imprisonment. A railway company gives somebody power to take up persons who it believes are doing some wrong to the company. If a person is so authorized, that is an authority which may be unreasonably exercised. You cannot give an authority maliciously to prosecute, but you may give an authority to take up persons who are cheating a railway company. If that person to whom authority is given makes a mistake and takes up a person who is not cheating, it may in such a case be said properly to be the act of the company, and they are properly liable. But in that case there is neither malice nor motive in question. So also they may be liable for the publication of a libel. That unfortunate word 'malice' has got into cases of actions for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive. Therefore, the case is not the same as where actual and real malice is necessary. Take the case where a person may make an untrue statement of a man in writing, not privileged on account of the occasion of its publication; he would be liable although he had not a particle of malice against the man. So would a corporation. Suppose that a corporation published a newspaper, or printed books, and suppose that it was proved against them that a book so published had been read by an officer of the corporation, in order to see whether it

should be published or not, and that it contained a libel; an action lies there, because there is no question of actual malice or ill-will, or motive.[1]

"For these reasons, which I dwell upon at no greater length, more particularly as Mr. MacClymont did not cite any cases upon this point, or go into it at all, I am clearly of opinion that this action does not lie against this company."

At the conclusion of the judgments, Lord Selborne, referring to the question whether a corporation can be answerable for malicious prosecution, said: "The importance of that question would certainly have led me, before I could arrive satisfactorily at an opinion of my own upon it, to desire to hear it argued. It has not been argued at your lordships' bar . . . I do not think that your lordships' decision in the present case can properly be regarded as determining that question."

It seems, upon the whole, indisputable that the question is still open, which, considering the importance and prevalence of corporate commercial undertakings, is rather remarkable.

An action for malicious prosecution lies against a person who is bound over to prosecute, although a judge or magistrate ordered the prosecution and bound the defendant over to prosecute of his own motion. *Fitzjohn* v. *Mackinder*, 9 C. B. N. S. 505; and 30 L. J. C. P.

[1] It seems to follow from this that, in Lord Bramwell's opinion, a corporation could not, under any circumstances, be held liable for a libel published by them on a privileged occasion. I am not aware that the point has ever been raised.

257 (1861). As to this, however, see Chapter II. The case of *Fitzjohn* v. *Mackinder* appears to me to conflict in some degree with the old case of *Chambers* v. *Taylor*, Cro. Eliz. 900 (1602), but would no doubt be held to be of superior authority. At the same time, *Fitzjohn* v. *Mackinder* can hardly be considered as a thoroughly satisfactory and conclusive precedent, for various reasons given already in Chapter II.

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CHAPTER X.

FAVOURABLE TERMINATION OF PROSECUTION—EVIDENCE.

In order to recover damages for malicious prosecution the plaintiff must prove that the prosecution has come to an end, and has been decided in his favour, unless the proceeding against the plaintiff was *ex parte* and he could not be heard. There are several decisions as to what constitutes a termination of a prosecution in favour of the accused.

We have seen already that the writ of conspiracy contained an allegation necessary to be proved, that the plaintiff had been indicted and acquitted; and the inapplicability of this procedure to cases where the grand jury had thrown out the bill was one of the distinctions between the action in conspiracy and the action on the case.

It was always the law that in an action on the case or for malicious prosecution the acquittal or other favourable termination must be pleaded, and that a declaration not containing the allegation was demurrable. *Arundel* v. *Tregono*, Yelv. 116 (1608); *Fisher* v. *Bristow*, 1 Dougl. 215 (1779); *Morgan* v. *Hughes*, 2 T. R. 225 (1788). In *Fisher* v. *Bristow* the reason of this was pointed out to be that, if it were not so, a plaintiff might recover

damages for a malicious indictment, and afterwards be convicted upon it.

In *Whitworth* v. *Hall*, 2 B. & Ad. 695 (1831), it was held that a declaration in case for maliciously and without probable cause suing out a commission of bankruptcy against the plaintiff was demurrable, because it did not allege that the commission had been superseded. *Castrique* v. *Behrens*, 3 E. & E. 720 (1861), was a somewhat similar action for maliciously and without reasonable and probable cause causing a foreign Court to condemn the plaintiff's ship *in rem*. The declaration did not aver that the plaintiff could not, or did not, intervene, or that the judgment had been reversed. Crompton, J., delivered judgment, holding the declaration bad on demurrer, on the ground that, "if in the proceeding complained of the decision was against the plaintiff and was still unreversed, it would not be consistent with the principle on which law is administered for another Court, not being a Court of Appeal, to hold that the decision was come to without reasonable and probable cause. There is no direct authority on the point, but it seems to us that the same principle . . . . applies where the judgment, though in a foreign country, is one of a Court of competent jurisdiction, and come to under such circumstances as to be binding in this country."

When the prosecution alleged to have been malicious was for misdemeanour, and the plaintiff was acquitted, he can prove his acquittal without producing a copy of the record; though if the crime of which he was

acquitted was felony, he must produce it. *Morrison* v. *Kelly*, 1 W. Bl. 384 (1762).

A prisoner on his acquittal has a right to receive, on demand, a copy of the record of his acquittal. *R.* v. *Brangan*, 1 Leach, C. C. 27 (1742). In 16 Car. II. an order was made and signed by five judges, in consequence of persons being hindered from prosecuting by the frequency of actions for malicious prosecution, that no copy of any indictment for felony should be given at the sessions at the Old Bailey without special order, upon motion made in Court, at the general gaol delivery. This order was re-published, by direction of the Court, in the May session of 1739, three years before *R.* v. *Brangan*, and upon the acquittal of Brangan his counsel moved for an order for a copy of the indictment to be delivered to him. Willes, C. J., refused to make the order, on the ground that the order of the Court did not override the common law right of prisoners on their acquittal "to a copy of the record of such acquittal for any use they might think fit to make of it; and that, after a demand of it had been made, the proper officer might be punished for refusing to make it out."

It seems probable that the reversal on appeal of a conviction is not a termination favourable to the person convicted upon which he can found an action for malicious prosecution. *Reynolds* v. *Kennedy*, 1 Wils. 232 (1748), which has frequently been quoted as an authority, was an appeal from the Court of King's Bench in Ireland. The declaration was for seizing the plaintiff's brandy, and "falsely and maliciously" exhibiting an

information against him before the sub-commissioners of excise for not having paid duty upon it. It alleged that the sub-commissioners condemned the brandy, and that the commissioners of appeal "most justly reversed the judgment of the sub-commissioners." It was held that as to the information before the sub-commissioners the declaration showed a foundation for the prosecution, and that as to the appeal "we cannot infer, from the judgment of reversal of the commissioners of appeal, that the defendant, the prosecutor, was guilty of any malice."

In *Mellor* v. *Baddeley*, 2 Cr. & M. 675 (1834), the plaintiff had been convicted of night poaching under 1 & 2 Will. 4, c. 32, and had suffered imprisonment in default of paying a fine, though he might under the statute have appealed. He was nonsuited, and the Court of Exchequer refused a rule; but *Reynolds* v. *Kennedy* was not referred to.

In *Basébé* v. *Matthews*, L. R. 2 C. P. 684 (1867), it was argued that a declaration was not demurrable which alleged a summary conviction from which there was no appeal, and the argument was not successful.

In *Boaler* v. *Holder*, 51 J. P. 277, and 3 Times Law Rep. 546 (1887), the plaintiff was indicted for publishing a libel knowing it to be false, and was convicted upon that indictment of publishing a libel, and sentenced to a term of imprisonment, which he duly underwent. Wills and Day, JJ., held that judgment had, upon proof of these facts, been wrongly given for the defendant, and made an order absolute for a new trial.

It appears from the Times report that the jury expressly found the plaintiff not guilty of publishing a libel knowing it to be false, and that, consequently, so far as the plaintiff was prosecuted for that offence, the prosecution terminated favourably to him.

Where the statement of claim alleges that proceedings analogous to a prosecution have terminated, it may, in some cases, be presumed by reasonable intendment that the termination was favourable to the plaintiff. *Reday* v. *McAndrew*, L. R. 9 Q. B. 74 (1873).

The single exception to the rule that the prosecution must have terminated favourably to the plaintiff is that it does not apply to cases where the proceedings were *ex parte*, and the plaintiff had no opportunity of being heard. See *Steward* v. *Gromett*, 7 C. B. N. S. 191 (1859), in which the defendant had made an *ex parte* application to a magistrate to bind the plaintiff over to keep the peace, and the plaintiff, in default of finding sureties, had been imprisoned for six months. The declaration setting out these facts was held good on demurrer, on the ground that in this instance, as in the case of maliciously exhibiting articles of the peace,[1] the usual rule as to a favourable termination did not apply.

[1] A person against whom articles of the peace are exhibited cannot be heard to contradict the statements in them, but must be bound over if they show sufficient cause. *R.* v. *Doherty*, 13 East, 171 (1810).

CHAPTER XI.

WANT OF REASONABLE CAUSE MUST BE PROVED BY THE PLAINTIFF.

SINCE the decision of the Court of Appeal in *Abrath* v. *N. E. Rail. Co.*, 4 Q. B. D. 440 (1883), it has been clearly established that the plaintiff cannot succeed unless he has proved not merely that there may not have been reasonable cause, but that as a matter of fact there was not reasonable cause. The question has, however, in earlier cases, given rise to a good deal of difficulty, plaintiffs having insisted that when they had proved the prosecution and its termination favourably to themselves they were entitled to recover, unless the defendants could show reasonable cause for having prosecuted.

In *Golding* v. *Crowle*, Sayer's Rep. 1 (1751), which was decided mainly upon another point,[1] it was said to have been laid down in *Savill* v. *Roberts* that, where the grand jury had found a true bill, the defendant was not "obliged to prove a probable cause for preferring the bill; but it shall lie upon the plaintiff to prove express malice." I do not think that Holt, C. J., in *Savill* v. *Roberts*, went so far as to suggest that the finding of a true bill by the grand jury negatived want of reasonable

[1] *Vide ante*, p. 58.

cause for preferring it. It was more than once held subsequently that a plaintiff who had merely proved his acquittal, without giving further evidence of want of reasonable cause, must be nonsuited. *Purcell* v. *Macnamara*, 9 East, 361 (1808); *Byne* v. *Moore*, 5 Taunt. 187 (1813). In the latter of these cases the indictment is said to have been for slander. *Nicholson* v. *Coghill*, 4 B. & C. 21 (1825), was an action for malicious arrest, and the facts were that the defendant had the plaintiff arrested on mesne process, filed no declaration until he was ruled to declare, and when he was ruled to reply discontinued and paid the costs. This was held to be sufficient evidence of malice and want of reasonable cause to sustain a verdict for the plaintiff, and Bayley, J., in giving his judgment, referred to the following passage in Buller's Nisi Prius (B. N. P. 14): "And when the facts lie in the knowledge of the defendant himself, he must show a probable cause, though the indictment be found by the grand jury, or the plaintiff shall recover without proving express malice. *Parrot* v. *Fishwick*, London after Trinity, 1772." I think that, except in so far as it is an excellent piece of advice in the conduct of defences, especially now that the question of reasonable cause is practically decided by the jury, this statement of Buller's must be considered bad law. Nor do I think that it was borne out by the case on which it was founded, a note of which is appended to the report of *Purcell* v. *Macnamara*, 9 East, 361, at p. 362, n. The action of *Parrot* v. *Fishwick* was tried by Lord Mansfield, who appears to have told the jury, in summing-up,

that as there had been in that case a true bill found, and an acquittal by the petit jury, "it was not necessary to prove *express* malice; for *if it appeared* that there was *no probable cause*, that was sufficient to prove an *implied* malice, *which was all that was necessary to be proved to support this action.* For in this case all the facts lay in the defendant's own knowledge; and if there were the least foundation for the prosecution, it was in his power and incumbent on him to prove it." It appears to me that the words "this action" apply not to actions for malicious prosecution generally, but to the particular action which Lord Mansfield was then trying.

In *Willans* v. *Taylor*, 6 Bing. 183 (1829)—on the first occasion of its coming before the Court—it was held generally, that a plaintiff who gives some evidence of want of reasonable cause puts it on the defendant to prove reasonable cause affirmatively. In *Cotton* v. *James*, 1 B. & Ad. 128 (1830), Lord Tenterden said: ". . . in general the plaintiff must give some evidence showing the absence of probable cause. But such evidence is, in effect, the evidence of a negative, and very slight evidence of a negative is sufficient to call upon the other party to prove the affirmative." *Brooks* v. *Blain*, 39 L. J. C. P. 1 (1869), is another authority to the effect that the plaintiff must prove his case.

These decisions have to some extent lost their importance since the decision of *Abrath* v. *N. E. Rail. Co.*, 11 Q. B. D. 440 (1883). In that case the judgment of the Divisional Court in the plaintiff's favour rested mainly on the ground that Mr. Justice Cave had

misdirected the jury in telling them that the onus of proving that the defendants did not take reasonable means to inform themselves of the true facts of the case rested on the plaintiff. It was to this point that the arguments and judgments in the Court of Appeal were mainly directed, and on this point all the members of the House of Lords agreed with the Court of Appeal, though they did not discuss it in their judgments. Under these circumstances it seems to me that the judgments of the Master of the Rolls and Lord Justice Bowen are the *locus classicus* for the proposition, that the plaintiff in malicious prosecution must prove his case.

The following extracts from the judgment of Bowen, L. J.,[1] contain, I think, the existing law on the subject :—

"This action is for malicious prosecution, and in an action for malicious prosecution the plaintiff has to prove, first, that he was innocent,[2] and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be, in the eyes of the judge, inconsistent with the evidence of reasonable and probable cause; and, lastly, that the proceedings of which

[1] 11 Q. B. D. at p. 455.

[2] I know of no other authority for this proposition. It may be assumed that no jury would ever return a verdict for a plaintiff whom they believed to have been guilty; but it is quite conceivable that a guilty man might be prosecuted maliciously and without reasonable cause, and acquitted. Would he be legally entitled to recover?

he complains were initiated in a malicious spirit; that is, from an indirect and improper motive, and not in furtherance of justice. All these three propositions the plaintiff has to make out, and if any step is necessary to make out any one of those three propositions, the burden of making good that step rests upon the plaintiff. I think the whole of the fallacy of the argument addressed to us lies in a misconception of what the learned judge really did say at the trial, and in a misconception of the sense in which the term 'burden of proof' was used by him. Whenever litigation exists somebody must go on with it; the plaintiff is the first to begin; if he does nothing he fails; if he makes a *primâ facie* case, and nothing is done to answer it, the defendant fails. The test, therefore, as to the burden of proof or onus of proof, whichever term is used, is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case; for it is obvious that, as the controversy involved in the litigation travels on, the parties, from moment to moment, may reach points at which the onus of proof shifts, and at which the tribunal will have to say that, if the case stops there, it must be decided in a particular manner. The test being such as I have stated, it is not a burden that goes on for ever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, and the burden rolls

over until again there is evidence which once more turns the scale. That being so, the question of onus of proof is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests. It is not a rule to enable the jury to decide on the value of conflicting evidence. So soon as a conflict of evidence arises, it ceases to be a question of onus of proof." The Lord Justice then points out that sometimes definite questions are put by the judge to the jury, as had happened in the case before him, and as, I imagine, will more and more frequently happen in actions for malicious prosecution. He proceeds:—"If there is a conflict of evidence as to these questions, it is unnecessary, except for the purpose of making plain what the judge is doing, to explain to the jury about onus of proof, unless there are presumptions of law, such as, for instance, the presumption of consideration for a bill of exchange, or a presumption of consideration for a deed. And if the jury is asked by the judge a plain question, as, for instance, whether they believe or disbelieve the principal witness called for the plaintiff, it is unnecessary to explain to them about the onus of proof, because the only answer which they have to give is Yes or No, or else they cannot tell what to say. If the jury cannot make up their minds upon a question of that kind, it is for the judge to say which party is entitled to the verdict. I do not forget that there are canons which are useful to a judge in commenting upon evidence, and rules for determining the weight of conflicting evidence; but they are not the same as onus of proof. Now, in an

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action for malicious prosecution, the plaintiff has the burden throughout of establishing that the circumstances of the prosecution were such that a judge can see no reasonable or probable cause for instituting it. In one sense that is the assertion of a negative, and we have been pressed with the proposition, that when a negative is to be made out the onus of proof shifts. That is not so. If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff.

"The terms 'negative' and 'affirmative' are, after all, relative, and not absolute. In dealing with a question of negligence, that term may be considered either as negative or affirmative, according to the definition adopted in measuring the duty which is neglected. Wherever a person asserts affirmatively as part of his case that a certain state of facts is present or is absent, or that a particular thing is insufficient for a particular purpose, that is an averment which he is bound to prove positively. It has been said that an exception exists in those cases where the facts lie peculiarly within the knowledge of the opposite party. The counsel for the plaintiff have not gone the length of asserting that in all those cases the onus shifts, and that the person within whose knowledge the truth peculiarly lies is bound to prove or disprove the matter in dispute. I think a proposition of that kind cannot be maintained, and that the exceptions supposed to be found amongst cases relating to the game laws may be explained on special grounds." The following para-

graph states the ways in which the jury may be asked for their verdict, and the way in which the jury in Abrath's case were asked for it. The judgment proceeds:—

"The question whether there was want of reasonable and probable cause depended upon the materials which were in the possession of the prosecution at the time it was instituted, and also on the further point, whether those materials were carefully collected and considered. Now, there might be two views of the materials which were in the possession of the prosecution. It may be said that the materials were evidently untrustworthy, or that they were obviously trustworthy, according as the one view or the other is taken of the facts. The burden of showing carefulness in the inquiry would be shifted according to the view of the facts adopted. If the materials were admittedly untrustworthy, that would be a strong reason for throwing on the defendants the burden of showing that they, nevertheless, had been misled, after all their care, into relying upon worthless materials. If the materials were obviously trustworthy, they would be enough, *primâ facie*, to justify those who trusted to them. The view for the plaintiff is, as it seems to me, that, as a matter of law, Cave, J., ought to have assumed that the materials in the possession of the prosecutors at the time they instituted the prosecution were untrustworthy and suspicious, and that he ought to have directed the jury to go on and consider, as if it were an independent matter, whether the prosecution had so conducted themselves as to relieve themselves of this grave opprobrium of having acted upon

worthless materials; in effect, that he ought to have left to them a specific issue whether the inquiry had been conducted reasonably and properly by the prosecution—whether they had collected the information carefully. Now, I think that would have been a mistake in law. The trustworthiness of the materials —I do not mean the legal inference to be drawn from them, but the worth of them—was a question of fact, not a question of law—a question of fact depending on the view the jury took about the evidence; and it seems to me that Cave, J., would have been wrong in dividing into two parts the questions of fact, assuming one-half necessarily to be decided one way, and telling the jury that the onus of proof shifted about the other. He put the two together, and asked the jury a question, I think, covering the whole of the controversy—whether the defendants took reasonable care to inform themselves of the true state of the case? He then told the jury that they must bear in mind that it lay on the plaintiff to prove that the railway company did not take reasonable care to inform themselves of the true state of the facts. The meaning of that is, that if the jury were not satisfied whether the defendants did or did not take proper care—inasmuch as the plaintiff was bound to satisfy the jury that the defendants had not taken due care—the defendants would in the end be entitled to the verdict. That direction was quite correct." The Lord Justice concluded as follows:—

"The counsel for the plaintiff contend that the onus lay on the defendants for this reason. They say: the

plaintiff had been shown to be innocent; the circumstances under which he was called upon to attend his patient were obviously consistent with innocence, even if McMann [for conspiracy with whom the plaintiff had been indicted] was guilty of imposture, and, apart from any particular proposition, innocence, under these circumstances, will be evidence of want of reasonable and probable cause. That was the contention. The plaintiff's counsel thus insisted upon drawing a line half down their own case. The whole case was made up of a quantity of facts, and if one group of facts was treated in the sense most favourable to the plaintiff, no doubt it would have established a strong case against the defendants which they ought to answer by proving, if they can, another group of facts. But the plaintiff's counsel had no right to divide their case in that manner, and to assume that an inference is to be drawn from half their facts, which throws an additional burden upon the defendants with regard to the other half. That is the real vice in their argument. It is contended that the defendants ought to have known that the witnesses against the plaintiff were persons of bad character. But this is a matter which affects the weight of their evidence, and not the onus of proof. It may be that it was a proper argument to be addressed to the jury, to ask them to find that, even if all these stories had been told to the defendants, still they were told by persons whom the defendants ought not to have accepted; that was a perfectly fair argument to address to the jury; but it was an argument on a matter of fact, and not on

a matter of law, and the plaintiff's counsel had no right to ask the learned judge to tell the jury to assume that a limited portion of the facts in evidence, as a matter of law, established a case against the defendants which the defendants had to answer by setting up some special case of their own. To do that would be to attempt to make the onus of proof shift in the middle of a conflict of evidence, whereas, as I explained when I began my judgment, the onus of proof is not a matter which enables a jury to decide between conflicting witnesses; and when there is evidence on which reasonable men may act one way or the other, to ask the learned judge to lay down such a rule as to shift the onus of proof in the middle of the case, would be to ask him to misdirect the jury; but the learned judge, so far from misdirecting the jury by adopting that view, directed the jury quite rightly.

"Something has been said about innocence being proof, *primâ facie*, of want of reasonable and probable cause. I do not think it is. When innocence wears that aspect it is because the fact of innocence involves with it other circumstances which show that there was the want of reasonable and probable cause; as, for example, when the prosecutor must know whether the story which he is telling against the man whom he is prosecuting is false or true. In such a case, if the accused is innocent, it follows that the prosecutor must be telling a falsehood, and there must be want of reasonable and probable cause. Or, if the circumstances proved are such that the prosecutor must know whether the accused is guilty or innocent, if he exercises reasonable care, it is only

an identical proposition to infer that, if the accused is innocent, there must have been a want of reasonable and proper care. Except in cases of that kind, it is never true that mere innocence is proof of want of reasonable and probable cause. It must be innocence accompanied by such circumstances as raise the presumption that there was a want of reasonable and probable cause. The ground of our decision comes back to what was suggested. Who had to make good their point as to the proposition whether the defendants had taken reasonable and proper care to inform themselves of the true state of the case? The defendants were not bound to make good anything. It was the plaintiff's duty to show the absence of reasonable care . . . ."

CHAPTER XII.

EVIDENCE AS TO PLAINTIFF'S CHARACTER.

It appears to have been the rule that, in actions for malicious prosecution, evidence that the plaintiff bore a bad reputation generally was admissible, but not the grounds of it. See *Rodriguez* v. *Tadmire*, 2 Esp. 721 (1799); and *Cornwall* v. *Richardson*, Ry. & M. 305 (1825); also *Downing* v. *Butcher*, 2 Moo. & R. 374 (1841), which latter, however, was an action for false imprisonment. As the plaintiff is, now-a-days, a necessary witness, and may be cross-examined to credit, the point is of hardly any importance.

CHAPTER XIII.

DAMAGES—SPECIAL DAMAGES—COSTS.

A SUCCESSFUL plaintiff in an action for malicious prosecution is entitled to recover damages for the costs of his defence, which used to be considered the main ground, and was probably the original ground, of the action, and for the indignity and injury to his fame or credit caused by the prosecution (*Savill* v. *Roberts*, 1 Ld. Raym. 374 (1678)); and if he has been charged together with other persons, he can recover in respect of the general costs of their defence, if he made himself liable. *Rowlands* v. *Samuel*, 11 Q. B. 39 (1847).

Special damage is not necessary to found the action, as the injury to reputation is enough. *Smith* v. *Cranshaw*, Sir W. Jones, 93 (1 Car. I.); and *Jones* v. *Gwynn*, 10 Mod. 148 and 214 (1713). But the cases where there was none can never have been common, and are not likely to recur now, although I apprehend that an action would lie for maliciously and without reasonable cause applying for a summons which the magistrate refused. In *Jennings* v. *Florence*, 2 C. B.

N. S. 467 (1857), it seems to have been thought necessary to aver special damage in an action for malicious arrest, where an arrest for a smaller sum would not have been actionable; but in *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674; 52 L. J. Q. B. 488 (1883), it was held that it was not necessary to prove special damage in order to recover for maliciously presenting a petition to wind up a company.

The amount of damage is, in this, as in other actions for tort, a question on which the Court will seldom interfere with the findings of the jury. The rule is laid down in *Leith* v. *Pope*, 2 W. Bl. 1326 (1780), several cases being collected in a note. The plaintiff was a baronet, and the defendant a money-lender who had prosecuted him for larceny, and admitted, in cross-examination, that his true reason for the prosecution was to get rid of some actions for usury which the plaintiff had brought against him. The jury gave the plaintiff 10,000*l.*, which even now would be a remarkable verdict, and the Court of Common Pleas discharged a rule for a new trial on the ground of excessive damages, observing, that "in cases of tort the Court will not interfere on account of the largeness of the damages unless they are so flagrantly excessive as to afford an internal evidence of the prejudice and partiality of the jury. That is, unless they are most outrageously disproportionate either to the wrong received, or to the situation and circumstances of either the plaintiff or defendant."

The costs of defending an action against a chief con-

stable for malicious prosecution could not be charged to the borough fund or borough rate, under 5 & 6 Will. IV. c. 76, s. 82,[1] though the prosecution had been instituted "at the direction of certain of the borough magistrates." *R.* v. *Mayor, &c. of Exeter*, 6 Q. B. D. 135 (1880).

Where a plaintiff had been prosecuted for perjury on several assignments, and had given evidence as to one assignment only, and recovered damages in respect of it, it was held that he was not entitled to the costs of witnesses whom he did not call, but who would have given evidence as to the other nine assignments, which were about an entirely separate matter. The defendant was not entitled to the cost of his witnesses as to the nine assignments, because the indictment was one cause of action. *Delisser* v. *Towne*, 1 Q. B. 333 (1841).

[1] This Act is now repealed by 45 & 46 Vict. c. 50.

CHAPTER XIV.

THE DISTINCTION BETWEEN MALICIOUS PROSECUTION AND FALSE IMPRISONMENT.

It often happens that a malicious prosecution is preceded or accompanied by a false imprisonment, and that an action is brought for both wrongs together. They are, however, essentially different. False imprisonment is wrongfully restraining the personal liberty of the plaintiff. Malicious prosecution is wrongfully setting the criminal law in motion against him. Restraining the personal liberty of another person is *primâ facie* a wrongful act; in other words, it is a thing which requires to be excused in order to show that it is not wrongful. Setting the criminal law in motion is *primâ facie* a thing which any person has a right to do, and it is necessary for a plaintiff, as has been explained in the preceding chapter, to show that in the particular instance it was done wrongfully, *i.e.*, maliciously and without reasonable cause, before he can recover for it. This is clearly stated by Lords Mansfield and Loughborough in *Johnstone* v. *Sutton*, 1 T. R. at p. 544 (1786). They say: "There is no similitude or analogy between an action of trespass, or false imprisonment, and this

kind of action. An action of trespass is for the defendant having done that which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution which, upon the stating of it, is manifestly legal."

The distinction between wrongfully seizing the plaintiff, *e. g.*, where a person, not being a constable, arrests, although no felony has been committed, and locking him up, and wrongfully laying an information before a magistrate, is clear enough. Confusion is more likely to arise when a private person charges the plaintiff with an offence and causes him to be taken into custody.

The distinction, in such a case, between the two torts is explained in *Austin* v. *Dowling*, L. R. 5 C. P. 534; and 39 L. J. C. P. 260 (1870). The plaintiff sued the defendant in the Bristol County Court for false imprisonment, expressly waiving any right of action he might have for malicious prosecution. The plaintiff lodged in the defendant's house and owed him money, and the defendant seized the plaintiff's goods as security. The plaintiff fetched a policeman and demanded his goods, which demand being refused, he went upstairs and broke the door of the room where his goods were. The defendant thereupon gave the plaintiff in charge for felony in breaking the door, and the policeman took him to the station. The inspector at the station declined to keep the plaintiff in custody unless the defendant charged him with felony and signed the charge-sheet, which the defendant did, the charge being "feloniously breaking and entering into a bedroom" in

the defendant's house. The plaintiff was therefore detained in custody, bail being refused, until the next morning, when the magistrates dismissed the charge. The County Court judge held that the whole transaction amounted to malicious prosecution, which County Courts have no jurisdiction to try (9 & 10 Vict. c. 95, s. 58), and nonsuited the plaintiff, at the same time stating a case for the superior Court. The Court held that the imprisonment at the police station was imprisonment by the defendant, because the defendant knew that his making the charge would cause the plaintiff to be imprisoned, and that otherwise the inspector of police would not detain him; that the police inspector was not a judicial but only a ministerial officer of justice, and that the false imprisonment did not end, or the malicious prosecution begin, until the charge was made next morning before the magistrate. Willes, J., said that there was clearly evidence of false imprisonment, and proceeded:—"How long did that state of false imprisonment last? So long, of course, as the plaintiff remained in the custody of a ministerial officer of the law, whose duty it was to detain him until he could be brought before a judicial officer. Until he was so brought before the judicial officer there was no malicious prosecution. The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The

party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment."[1] In *Morgan* v. *Hughes*, 2 T. R. 225 (1788), the defendant was a magistrate, who had been asked to settle a dispute about a sheep, and who of his own motion issued a warrant upon which the plaintiff was arrested. It was held that the declaration ought to have been in trespass for false imprisonment, and not, as it was, in case for malicious prosecution. If this decision were now to be upheld, it would probably be on the ground that the defendant, when he issued the warrant, was not acting in his judicial capacity.

[1] This distinction does not appear to have been clearly apprehended by the parties to *Dawson* v. *Vansandeau*, 11 W. R. 516 (1863), whose curious and rather confused story is told on p. 51.

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